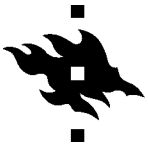

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EFFECTIVE ROAD TO QUANTIFICATION OF DAMAGES IN EU ANTITRUST LAW

ACTIONS FOR DAMAGES: A HINDER OR A FACILITATOR?

UNIVERSITY OF HELSINKI
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Master's Thesis
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Tiivistelmä - Referat – Abstract

The competitiveness in and of the internal market of the EU is one of the main objectives of the Treaty of the European Union. In the EU, private enforcement is seen as a complimentary mechanism of public enforcement to attain the goals of competition law policy. Following the publication of Regulation 1/2003, the private enforcement of EU competition law has gained steady pace for development. During the past decade multiple legal instruments have been produced by the EU legislators to facilitate actions for damages, however, with limited accuracy and clarity for the victims of competition law infringements.

The latest legislative piece, the Damages Directive, does not provide harmonization of the procedures leading up to the quantification phase or the methods for quantification .The procedural elements of the actions for damages are greatly left to the discretion of the national courts as long as the application of the twin EU principles of effectiveness and equality are ensured. The lack of clear guidelines in these aspects of the damages actions often create ambiguity and contrasting outcomes in different member states. Furthermore, the interplay between the tasks assigned to EU competition law combined with the application of "concept of effectiveness" often puts the parties in confusing situations in the hands of the national courts.

This study focuses on the possibility of a victim of competition law infringement to effectively bring an action for damages by demonstrating the shortcomings of the various elements of the claim process and assesses whether the legal instruments and applicable other sources of law provide sufficient relief for the claimants. Furthermore, the policy choices of the EU are assessed to their compatibility from the potential victim's and defendant's perspective. The methods of quantification, which is the last phase of the claim is also reviewed from both economic and legal perspective. regarding The claim friendliness of the processes is also reviewed through its application, which remains in the hands of recent national case law. The study concludes that the policy choices are the main reason behind the inefficiencies and that effective application of competition law can be found by a more concentrated approach between the deterrence and corrective tasks assigned to private enforcement and advises the claimants to pursue a number of procedural reliefs.

Avainsanat – Nyckelord – Keywords

EU Competition law, Damages Actions, Private Enforcement, Quantification of Damages, Effective application of EU Law

Säilytyspaikka – Förvaringställe – Where deposited

Muita tietoja – Övriga uppgifter – Additional information

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,
ECLI:NL:RBMNE:2016:4284 *East West Debt B.V., v, United Technologies Corporation, et.al*

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Abbreviations

BCA	Belgian Competition Authority
ECJ	European Court of Justice
EC	European Commission
NCA	National Competition Authority
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
EP	European Parliament
AG	Advocate General
CAT	Competition Appeal Tribunal

1. Background, Research Questions, Scope and Methodology

1.1. The Evolution of the Revolution: Private Enforcement of EU Competition Law

It is a firmly established notion that competition law and regulations are "a matter public policy" as stipulated by TFEU and therefore in the terminology of the ECJ.[12] The implementation of Private enforcement of EU Competition law, that is, an enforcement by means of a legal action brought to court by a private victim of an anticompetitive behaviour[3], although often compared to public enforcement, was also accepted to be a matter of "public policy" after the initial developments on the damages actions. This policy choice became visible in the Commission's White paper in 2006 where a reference was made to the development of a "competition culture" and thereby sending strong signals of involving private plaintiffs in the EU Competition Law enforcement[4].

Just a few years before the publication of the White Paper which lead to the damage's directive of 2014[5], the direct effect[6] of TFEU Art. 101 and Art. 102 were distinctly recognised by ECJ in its *Courage and Crehan* [7] decision[8]. The principal question asked to court was whether a harmed party to an illegal contract who is liable of restricting and distorting competition could claim damages from the other contracting party. The court has confirmed the distinct right of individuals who were harmed by unfair competition practices to claim compensation for

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[1] Niamh Dunne, The Role of Private Enforcement within EU Competition Law, The Dickson Poon School of Law Legal Studies Research Paper Series, paper no. 2014-37 (2014). p.1.

[2] C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA*. ECR-2006 I-06619. (Manfredi)

[3] David Ashton, Competition Damages Actions in the EU. (Elgar 2018) p.2.

[4] White Paper on Damages actions for breach of the EC antitrust rules, 2.4.2008 COM(2008). SEC(2008) 404-406.p.3. (White paper). The Commission discusses the welfare contributions of a "competition culture" thereby indicating the involvement of private parties in the EC Competition Law enforcement.

[5] Directive 2014/104/EU, 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. Art.3. (Damages Directive).

[6] Direct effect refers to enabling of individuals to invoke rights from European acts immedietaly before a national court.

[7] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others. ECR* 2001 I-06297. Paras 26-29.(Courage).

[8] Although the Articles 85 (101TFEU) and 86 (102TFEU) of TEU were implied to be safeguarded by the courts in the earlier "*Belgische Radio en Televisie v SV SABAM*" case. Case 127-73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior,* para 3.

suffered damages and reiterated the principle of effectiveness[9]. To achieve the full effectiveness of Art 101[10] ECJ tasked the national court with calculation and assessing the extent of the damages arising from an EU competition law infringement.[11] The decision was later revisited and confirmed in *Pfleiderer* as well.[12]

In tandem with the legislative efforts, the development of private enforcement continued in the court with the "*Manfredi*"[13] case. The *Crehan* judgement had already set out the causation requirement and with this case ECJ moved onto address other issues related to standing[14], limitation periods[15], types of damages[16], principals on the quantum of the damages[1718], and equally important, reiterated the requirement of "full compensation" from the earlier *Marshall(II)* case[19].The requirement was later recognized in the White paper in 2008[20] as a principle, and later became a distinct right under the Damages Directive.[21]

These decisions were critical developments where the court acknowledged that unfair competition practices can equally harm private parties and where the inflicted harm can be shown and shown to be causally linked to the actions of the infringing party, the harm can be

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[9] *Ibid*, para 27. Prinmciple of effectiveness : The principle of effectiveness, prohibits the Member State courts to apply national remedies and procedural rules in a way that renders claims based on EU law impossible in practice or excessively difficult to enforce.
[10] Art 81, later was reformulated as Art (101).
[11] *Courage v. Crehan* decision was lacking any clear instructions on damages proceedings and more so with the quantification of damages.[11]After the return of the proceedings to England the High court noted that the issues relating to damages were not argued before the House of Lords, and consequently did not arise for decision.[11] This not only delayed the proceedings but signalled that effective application of competition law provision could not take place without due attention given to the procedural hinders especially on the type and quantum of the damages as these were not even argued in court.
[12] Case C-360/09, Pfleiderer AG v Bundeskartellamt (2011) para.28.
[13] Manfredi , para31.
[14] *Ibid*, para 70-72.
[15] *Ibid*, para 78-79.
[16] *Ibid*, para 84-85.
[17] *Ibid*, para 88.
[18] *Ibid*, para 95.
[19] Niamh Dunne, The Role of Private Enforcement within EU Competition Law, The Dickson Poon School of Law Legal Studies Research Paper Series, paper no. 2014-37 (2014). p.10. See Case C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority.* ECLI:EU:C:1993:335 (*Marshall II*).
[20] White paper. (n. 4).
[21] Damages Directive, (n. 5).

compensated in full. These principles formed the backbone of the legislative efforts and have made their way into the Damage's Directive of 2014.[22] Following *Manfredi*, It had become clear that private enforcement was no longer in "its infancy"[23].

Meanwhile, after the decentralisation of the competition enforcement and introduction of Regulation 1/2003, the Commission and the member states were equipped with additional powers, and NCAs and national courts have become active actors in the application of TFEU Art 101 and Art 102.[24] From this point onwards, the necessity of clearer procedural guidelines became evident and the Ashurst report in 2004 has made the first attempt to patch the procedural shortcomings of the private actions. The report laid out the empirical economic models and methods applicable for damages quantification based on the limited amount of cases.[25] The but-for comparator models which are relied heavily for quantification today were firstly mentioned in this report[26]. In contrast to the AG opinion in Manfredi case, the report underlined the state of underdevelopment in private actions and pointed at contradictions between national-EU law and obstacles before the principle of full compensation.

The modernization[27] continued with the Commission Green Paper in 2005[28]. The type of damages, indirect purchaser standing and passing-on were consulted with the stakeholders.[29] The development gained a further momentum with the White paper issued in 2008.[30] After these

[22] Damages Directive, (n. 5), recital 11.
[23] *Manfredi* , Opinion AG.
[24] Council Regulation (Ec) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Art 5,6. (Regulation 2003).
[25] Ashurst Report, Study On The Conditions Of Claims For Damages In Case Of Infringement Of EC Competition Rules Analysis Of Economic Models For The Calculation Of Damages. (2004) (Ashurst Report). P4. These methods are studied further in this study.
[26] *Ibid*, Report is based on the objective of returning the plaintiff to the position but for the infringement.
[27] Dunne (n 1), p.7. Dunne believes the modernization which referred to regulatory developments is now slowly turning into a more economic approach (effects approach).
[28] Green Paper, Damages actions for breach of the EC antitrust rules (presented by the Commission) SEC(2005) 1732. Section 2.3. (Green Paper).
[29] Indirect purchaser refers to any purchaser down the supply chain who may allegedly be passed on an overcharge as a result of competition law infringement.
[30] White paper (2008) para 1.2.

consultations, the tasks assigned to EU competition law[31] were clearer and the deterrent effect of compensatory justice was acknowledged.

After a silent period, in 2013[32], the unbinding Staff working Document "Practical guide to Quantification of Damages" was published.[33] While reiterating the former established principle of full compensation, it also gave further insights on the application of quantification methods. In the same year, the long-awaited proposal for Damages directive finally arrived and was signed into law at the end of 2014.[34]

Nevertheless, in conformity with the principle of effectiveness, and given the diversity in national remedial rules, the inherent limitations among the national legislations have led the Commission to refrain from producing restrictive guidelines to ensure the practice of these methods do not become "practically impossible or excessively difficult". Despite the generally accepted notions that competition infringements cause harm to many private parties as well as society as a whole, and that damage that can be measured, and shown to be causally linked to the infringement can be compensated, the current development of EU legislation is not yet clear enough to ensure legal certainty or to "sufficiently" facilitate the recovery of damages. Issues centred around the steps before the quantification of damages, such as the "sufficient extent" of the causality to be considered established, or the extent of the damage to be considered "fully compensated" are not clearly defined. [35]

Furthermore, in the application of the principle of effectiveness, the extent of claimant friendliness, i.e. the discretion of the national courts in the application of the EU law, is left open and often ambiguous use cases of the word effectiveness, causal link, or quantification methods are encountered. The numerous legal instruments available to the national courts combined with

[31] See section 2.1.2. above
[32] Dunne (n 1). P.12. Niamh Dunne mentions in her paper the leaking of the proposal for Directive and it including provisions on collective reddress mechanisms and the exclusion of parliement caused silence.
[33] SWD (2013) 205 Commission Staff Working Document, Practical Guide Quantifying Harm In Actions For Damages Based On Breaches Of Article 101 Or 102 Of The Treaty On The Functioning Of The European Union(Guidance on Quantification). Para. 17.
[34] Damages directive.
[35] In the Damages actions most of the problems seem to occur before the cases reach to the quantification phase, i.e. the part that the subtantive law is applied.Hence the choice of the title of the study.

their interchangeable interpretation of the tasks assigned the EU competition law and in particular private enforcement, creates confusing situations and uncertainty for all parties involved in actions for damages. The need for scholars to repeatedly revert to older Commission publications/working papers to understand the roots of the new provisions is what the author believes to be "sufficient" evidence that there is some level of confusion present in this field. This is exactly what this study will be focusing on; to demonstrate the shortcomings of the substantive law as well as practical implementation of Private Enforcement in EU.

1.2. Research Questions, Delimitation and Structure

1.2.1. Research Questions and Delimitation

The main research question that will be addressed in the following chapters is how a victim of competition law infringement can, effectively, bring an action for damages in court. The question will be answered by demonstrating the obstacles and ambiguities in the step by step application of EU substantive law in the damages actions at the national level, as well as by scrutinizing the tasks assigned to Private enforcement of EU competition law and EU competition law in general. Furthermore, the available legal instruments and methods of quantification will be assessed in relation to the complexities or shortcoming they may produce during actions for damages. Identified obstacles will also be placed in context of recent national case law. By so doing, this study aims to establish patterns for result oriented damages actions.

In the analysis, due attention will also be paid to the perspectives of defendants or individuals who are prone to become victims of competition law infringements. It should be mentioned that this analysis is made based not only on the latest legislation, Damages Directive of 2014, but on all relevant sources of EU law in relation to actions for damages. The Directive itself contains references to EU legal principles and earlier case law, and thus its application cannot be complete without the surrounding sources of law.[36] In other words, the identified ambiguities or obstacles may be the result of the intertwinement of many different sources and levels of EU law such as EU principles, EU case law, EU legislation, national law and available remedies.[37]

[36] See Section. 2.4.
[37] Aspects related to evidence will mostly be left out given the harmonization level achieved in the Damages Directive.

Additional references will also be made to US legislation and case law in order to review and gain insights from similar scenarios with different approaches.

Regarding the terminology, the key word. “effectiveness” for this study refers to overcoming an identified obstacle or an ambiguity resulting from the different interpretation/application of EU law at the national level. In other words, “effectiveness” is not a narrow interpretation of the EU “principle of effectiveness” although, it may refer to the same meaning as the principle has a positive meaning as to rendering the application of EU law possible. Therefore, the same word will be used interchangeably depending on the context and will be made clear to the reader where necessary.

1.2.2. Structure

The research questions will be answered based on the following 5 chapters. The first chapter presents the reader with background information on the development of Private enforcement in EU from both the historical and factual point of view, focused on case law and the development of EU legislation. The identified issue from the ongoing efforts to improve the application of Private enforcement is laid as a research question and the limitations and structure of the study is determined with the appropriate methodology to conduct the research.

Chapter two will examine competition law in its general application and specifically in the EU. Firstly, competition law and its goals are explained in a general sense. The differing legal cases of competition law and its enforcement mechanisms are analysed from the perspective of efficiency and effectiveness. Consequently, the chapter looks thoroughly into the tasks assigned to private enforcement of competition law and examines its objectives in EU. The interchangeable or combined uses of the tasks for different policy goals are analysed from the perspective of the damages actions and the “road to quantification” is examined for ambiguities and obstacles. Lastly, the available legal tools in effect are examined.

Third chapter looks thoroughly into the quantification phase of damages actions where firstly the types of damages and individuals who are potentially prone to be victims of infringements are studied. After the identification of the general characteristics of damages, a thorough

examination is done on the methods of quantification for their shortcomings and correct use cases. The examination also addresses instances where the current competition regime in the EU fails to substantially tackle infringements, as well as noting various examples where overcompensation and passing-on situations can falsely be evaluated. The insights gained in this chapter are put further in use in the fourth chapter.

Fourth chapter is focused on practical examples of competition infringement in EU case law. The cases examined are mostly from the member states that are keen on accepting jurisdiction in actions for damages[38]. A comparative study on standing issues surrounding the establishment on the extent of harm, causal link, passing on and the application of the quantification methods is used to illustrate the lack of legal certainty in the aforementioned issues. And particular attention will be given to the application of the tasks assigned to private enforcement of competition law in the corresponding jurisdiction, which will be used to draw conclusions to their interoperability.

The fifth section will overview conclusions on the assessment made on the previous chapters and establish patterns that lead to the ambiguous application of competition law or obstacles and impairments to effective enforcement of actions for damages associated with infringements of competition law.

1.3. Methodology

The legal methodology used for the study is the legal dogmatic method. While there is not a general definition to this methodology, it is deemed to be a suitable model in studying a system based on the dynamics and systematics from inside.[39] In other words, dogmatic method brings clarity as it allows to analyse and understand the EU system as a whole and not fragmented into member states. The explanation and clarification system provide are essential to identify the shortcomings for the purposes of this study. This method will also allow to systemize the legal choices and norms within the meaning of this study and help establish patterns. The available

[38] The author's language knowledge is also relevant in the choice of case law.
[39] Jan M. Smits, What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research, p.5.

legal tools, i.e. Damages Directive, Guidance on quantification, national and EU case law as well as semantical choices of the courts on EU principles will be interpreted and examined in this context.

Another suitable method may be said to exist is the European legal method. Parallel to the dogmatic method, it also provides a normative look into the system as a whole. Hesselink[40] contends that the use of European legal method is a very smart idea and a necessary one because a normative system must have a debate or discourse based on its normative assumptions. EU law in this regard is a very different and uncharacteristic system; and a comparison with other legal systems cannot be made the same way that it would be possible between two different member states. Nevertheless, since legal dogmatic method is useful and suitable to attain the goals of this study and given the similarity between the two methods for the purposes of this study, the legal dogmatic method is preferred.

In the second part of the study normative theory will be utilized to understand if there would be a more suitable regulatory option based on the findings of the study.[41] Normative theory deals with theoretical and policy considerations and, in that, it's different from legal dogmatic theory, which deals more with positive dimensions. The positive dimension is less abstract and mostly concerned with the interpretation of the normative regulations into positive legal rules.[42] For this reason, the normative theory is more suitable to analyse the outcomes of the comparative study and contrast them with the policy choices studied in the first part of the study.[43]

Furthermore, in the section studying the empirical quantification methods of damages, some economic considerations are also involved in identifying obstacles. These methods cannot

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[40] Martijn W. Hesselink, A European Legal Science? On European private law and scientific method, Centre for the Study of European Contract Law Working Paper Series No. 2008/02, p.37.
[41] Second part of the study refers to chapter 3 and beyond , as from that part onwards there is no longer the need to study the substantive law, and its the starting point of the comparative study.
[42] Benedict Sheehy, And Donald Feaver, Designing Effective Regulation: A Normative Theory, UNSW Law Journal Volume 38(1) p.392.
[43] The short conclusions drawn in section 2.3. will assess outcomes of the dogmatic method utilized in the first part of the study in section 4. 'Practical insights"
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adequately be assessed based on the methods mentioned above, nor are they meant to. Economics may help law to understand and justify the conclusions it draws based on legal research, and this is the extent its used for the purposes of this study. As Siems[44] contends, any further attempts to use interdisciplinary approaches for legal research when a certain narrowness is confronted, may cause other narrownesses.

2. Framework in Development, Private Enforcement of EU Competition Law

2.1. Competition Law Enforcement

Economic theory of optimal deterrence holds that expected fine should equal the harm inflicted.[45]A similar balance is also sought in competition law enforcement and reaching the goals of competition policy. In the pursuit of an optimum competition law enforcement, a combination of state authorities and private parties must act together and interchangeably[46]. Public enforcement is when the state's watchdog suspects or is alerted regarding a breach of competition law and takes action to suspend and punish the infringer, while private enforcement, takes place when a private entity suffers damage as a result of a similar infringement and turns to the other party for compensation. A short formulation like above may suffice to describe both mechanisms, but traditionally, the dichotomy of public and private enforcement is not a feature unique to antitrust. It goes beyond the mere meaning of "set of rules" both in the public and private sphere and formulates the roles assigned to the state and the citizens to implement the law.[47]This relationship between the public and private entities help reach different goals of competition policy more efficiently by different mechanisms.

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[44] Mathias M Siems, A World Without Law Professors. Methodologies of Legal Research. What Kind of Method for What Kind of Discipline? Hart 2011, P.84

[45] Wouter P. J. Wils, Yearbook of European Law, Volume 15, Issue 1, "To Deter or Not to Deter" 1995, p.17.

[46]Optimum enforcement of competition law refers to the best balance of the use case of either enforcement mechanism in the attainment of decision in a given case.

[47] Assimakis P. Komninos, "Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari" 16th Annual EU Competition Law and Policy Workshop (2011). p.1.

2.1.2. The Different Use Cases of Efficient Enforcement Mechanisms. Why We Need Private Enforcement and Why We Don't?

The roles of both the state and the citizen take form based on the four tasks broadly assigned to competition law enforcement.[48] Some scholars believe that these tasks can be assigned to both mechanisms, but most of the time, there is an evident separation in the abilities of one mechanism over the other. [49]Speaking from a general perspective, it is appropriate to make a comparison to map out which mechanism is a better fit for the given duty.

Competition law regulations need proactive adjustment as the societal opinion, and the market realities may evolve in time parallel to the developments in the technology and other societal influences. Therefore, the initial duty should be to develop and clarify competition law regulations[50]. The legislative mechanisms are usually keen on taking on this task as well, but not as good and effective as public enforcement actors. The NCA's and courts possess more use case examples and are more efficient and proportionate than legislative mechanisms. Furthermore, in terms of communication channels and liaison with other governmental authorities, public actors are equipped with all the necessary privileges in the passing of the information. Private actors on the other hand, usually do not have enough incentive to address a societal issue or do not opt for optimal enforcement or pursue competition law goals, but rather settle.[51]Additionally, if the private actor is litigating a follow-on damages action, it is usually based on the earlier decision of public judicial actors which demonstrates that efficiencies lie with the public judicial actors.[52] Nevertheless, private enforcement can still fulfil this task to some extent and the stand-alone cases are likely to contribute to the general development of competition regulations[53]. The limitation however is that they would reflect a specific aspect of a general interest in society which needs thorough evaluation in light of the pool of experiences

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[48] Wouter, P.J Wils. World Competition, Volume 32, No. 1,(2009) p.6 Originally he speaks of 3 tasks. It was combined with a 4th from the author of this study.
[49] Komninos (n 47).
[50] Wils, (n 45) p.7.
[51] Wouter, P.J Wils, Should Private Antitrust Enforcement Be Encouraged in Europe ? World Competition, Volume 26, Issue 3, (September 2003). p
[52]Wils, (n 45) p.7
[53]*Ibid*, Wils explains Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7817 which led to an injunctive relief, but claims number of cases are of insignificant numbers.

from public enforcers. The latter fact points out the continuous dependence of the private actors to public decision making and their relative unfitness for this duty.

The second duty is the injunctive function of the enforcement.[54] Private parties may request injunction orders from the court or NCAs to stop an alleged violation of competition law. While the execution of the order obviously is a task for public enforcement, private parties may also contribute as complainants. The order may indeed stop a violation or can be used in positive sense to cease a similar violation in the future[55] but, injunctions also have the potential to be used as a sword by private parties[56]. In this sense it seems that involvement of both mechanisms is necessary to fulfil the duty, however with an optimum balance, to prevent abusive injunctions and losses for other private parties.

The third duty is the prevention of violations i.e. deterrence and punishment task. It can be characterized by *ex-ante* regulation for the deterrence and prevention aspects and *ex-post* regulation for the punitive side of enforcement.[57] The deterrence task may receive some contribution from private enforcement as the damages would form an additional burden on top of the punishments.[58] Nevertheless, some social costs also occur in the society as there will always be victims who do not or cannot sue due to limited sources or unattributable awards to damages. Similarly, if a social justice system would depend on private enforcement, some individuals would take a "free ride" and wait for other victims for enforcement.[59]*Ex-ante* regulation may become abused by the private entities by opting in a trade-off situation of expected benefits versus the expected costs of violations , thereby indicating potential abusive outcomes on the side of private enforcement.[60] Public enforcement on the other hand can perform these tasks more efficiently for two reasons: due to wider investigative powers, and due

[54] Komninos,(n 47). p.3.
[55] *Ibid.*
[56]Wils, (n 45) p.3.
[57]Wils, (n 45) p.8
[58]*Ibid.* p.9.
[59] Roger van den Bergh, Willem van Boom, Marc van der Woude Erasmus University Rotterdam, the Netherlands, The EC Green Paper on Damages Actions in Antritrust Cases An Academic Comment, 2006, p.5.
[60]Wils, (n 45) p.8

to more extensive sanctions, where not only damages based monetary sanctions but also prison sanctions are available.[61]

Lastly, is the corrective justice task through compensation. This task appears at its face to be a task for the private enforcers due to the accuracy of the damage only the affected private party can be acquainted with. While being mostly true, it does not make the role of public enforcement involvement inexistent.[62] In some jurisdictions, the public enforcers may take upon themselves the task to bring an action for damages on behalf of the victims.[63] The same may also be put in motion in the form of a payment scheme issued by the public enforcers.[64] Furthermore, taking away benefits of a violation may also be understood within the meaning of the "corrective justice", i.e. disgorgement[65] which is undeniably a task for the public enforcers.

Speaking of the efficiencies, some of the tasks mentioned above seem to be fulfilled interchangeably. An exception to the rule can be said to exist in the public enforcers' involvement in compensatory justice, more specifically quantification phase of damages cases. Issues such as of proving causation and the damages quantification are distinct tasks that should only be assigned to private enforcement of competition law.[66] The public enforcers' position as a neutral state authority should be maintained and not jeopardized by tasking them with damages quantification. In an erroneous quantification session, the impartiality of state will become questioned, and the public authority may unintentionally end up serving private interests.[67][68]In

[61] *Ibid.* p.10.
[62] Komninos,(n 47). p.3.
[63] *Ibid.* Referred jurisdictions are France and United States.
[64] *Ibidem.*
[65] Wils, (n 45).p.14. Wils underlines that disgorgement and compensation may overlap within the meaning of corrective justice as right to compensation also supports the deterrence task, at least when awarded . See also for further clarification: Kent Roach and Michael J. Trebilcock, Private Enforcement of Competition Laws, Osgoode Hall Law Journal Volume 34, Number 3 (Fall 1996). p.496. See also Andrea Renda, et.al. Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios Final Report, (2007) (Impact Report) p. 78.
[66] *Ibid*, p.15
[67] Komninos,(n 47). p.23.
[68] One may also indicate that an errounous quantification can also be a result of a court session. This is true however, there is the possibility to rebut the quantification in different ways. A task assigned to competition authorities to quantify on behalf of the victim would severely limit the rebuttal possibilities.

the ideal situation, public enforcers choose to focus only on the anti-competitive effects of a case, rather than the quantification of the harm the same anti-competitive action has inflicted.[69] A supporting view from an European perspective in the ECJ case *T-Mobile Netherlands BV et al. v. Raad van bestuur van de Nederlandse Mededingingsautoriteit,* states following the detection of an anti-competitive conduct that "*Whether and to what extent, in fact, such anticompetitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages"* thereby ruled out and public involvement in the quantification phase of damages actions.[70]

Public and private enforcement can complement each other. Corrective justice and compensation apparently can better be achieved by means of private enforcement and to some degree by means of disgorgement. On the other hand, the deterrent effect which private enforcement may create would depend on the trade-off situation the infringing party may consider, and as Wils suggests it can be better achieved by punitive damages. According to Wils the use case of private enforcement as deterrent factor is an unnecessary addition to the sanctioning instrument, as the same effect or even more deterrent factor can be achieved by just raising the amount of fines.[71] Another analogy can also be made to discourage private enforcement in remote cases that require lengthy procedures or minor damages cases.[72]Given the superiority of public enforcement mechanism over the private actions, the sources can better be invested in public enforcement for the sake of efficiency.[73][74]Similarly, when obstacles pile up during damages actions where the elements necessary to establish harm suffered or no direct causality can be established, reallocating sources to enhance the public enforcement system can achieve better overall result.[75] This preference choice aligns closely with the European Union principle of "Subsidiarity", where a decision is impossible to be made close to the citizen, a better overall result can be achieved at the EU level.[76]

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[69] Komninos,(n 1). p.24.
[70] *Ibid.*
[71] Wils (n. 45) p.484.
[72] Katri Havu, Causation and Damage: What the Directive Does Not Solve and Remarks on Relevant EU Law EU Competition Litigation 1st edition May 2019, p.194
[73] *Ibid.*
[74] Wils (n. 45) p.484.
[75] Havu (n.72) p.194.
[76] Principle of Subsidiarity TEU Art 5(3)

2.2. Private Enforcement of Competition Law in the European Union and Assigned Tasks

2.2.1. Envisaged tasks for Private Enforcement in EU

Already in 2001, Mario Monti, the European Commissioner for Competition Policy signalled the ultimate goals of the commission on private enforcement to the European community. The envisaged system was centred around three main topics which can be grouped in two relevant topics for private enforcement.[77]

Monti clearly dropped the discussion pertaining the necessity of the private enforcement and paved the way for the enforcement of competition law to become a combined effort among Commission, national courts and the competition authorities, as well as to utilize both enforcement mechanisms to complement each other. The approach in theory would stop the infringements, strengthen competition law rules which should contain "effective" remedies, and give widespread access to the latter for obtaining compensation.

The tasks thereby assigned to private enforcement were first, to help fulfil the competition enforcement's injunctive function by stopping infringements[78], and second, fostering the private enforcement's complementary functions by giving Articles 81 and 82[79] a local application in the hands of NCAs. The latter task would help fulfil the duty of clarification of prohibitions; and the practice of the deterrence function of enforcement through Ex-ante regulation.[80]

The second emphasis laid was the importance of the decentralization and effective application of the corrective task of competition enforcement. Principle of full compensation, economic analysis and balancing of interests were already acknowledged.[81] The ambiguity pertaining the

[77] Mario Monti, Effective Private Enforcement of EC Antitrust Law, Sixth EU Competition Law and Policy Workshop (June 2001). p.2.
[78] See section 2.1.2.
[79] Articles 101 and 102 TFEU.
[80] See section 2.1.2.
[81] Monti (n. 77) p.2-3.

EU – national law intertwinements seem to have been acknowledged and the proposed solution was a creative decision making during the balancing between EU and the national provisions[82].

2.2.2. Private Enforcement of Competition Law in the European Union

In line with the envisaged tasks above, the Commission feels that private enforcement is one of two pillars of EU competition law.[83] The ideal of bringing competition closer to citizens[84]combined with the view of the Commission meant that the goals of private enforcement came to complement public enforcement, thereby contributing to deterrence effect, and full compensation of victims,[85] which thereby, realized the corrective task of competition law, thus bringing competition law closer to citizens. This is interesting, as the principal objective pursued by the claim for antitrust damages is corrective justice and compensation, and not deterrence.[86]

In connection with the aforementioned, to ensure the effective application of EU Competition law rules and the direct effect of Art 101 and Art 102 of TFEU[87] every individual, including companies, have the right to start action for damages.[88] Actions for damages is regulated in most aspects by the Damages Directive, EU principles of effectiveness and equality combined with case law which provides clarification and guidance. Procedural steps for a successful claim or defence, the application of the principles, however, are not sufficiently clear as well as the establishment of sufficient extent of damages, or causal link to proceed to the quantification phase of actions for damages. These aspects will be studied analysed the following sections.

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[82] See further section 2.2.2
[83] *Ibid*, p.6
[84] Green Paper (2005) see 1.1
[85] Also interesting to read the contradiction that full compensation has become the "ultimate goal of "private enforcement in the Commissions White paper issued in 2008, while in the same paper, the tasks assigned to competition law were also confirmed and an acknowledgement of the benefits compensatory justice to deterrence and the competition system as a whole were included.
[86] Ioannis Lianos, Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe, CLES Research Paper Series 2/2015, p.7
[87] *Courage*,
[88] See section 2.2.3. for 'fairness" the idea behind the inclusive approach.

2.2.3. Concept of effectiveness - Fair Effectiveness?

The EU Principle of Effectiveness means national remedies and procedural law must not render the exercise of EU law "practically impossible or excessively difficult".[89] The principle allows the assumption '*any individual who suffered harm with a causal relationship between that harm and an agreement or practice prohibited under competition articles in TFEU, can claim compensation'* to be interpreted in the light of EU rules to ensure compliance of the national court with EU law.[90] In reality though, the concept of effectiveness in damages claims is confusingly vague. For this reason, the interpretation of the principle of effectiveness has been elaborated at length by the ECJ and further spin-off notions of "effectiveness" are found necessary to emphasize[91]. Among these are, the effective application of competition law, practical effect of competition articles, full effectiveness, effective enforcement and effective judicial protection. The relationship among these notions do not follow a logical explanation and requires clarification to fully grasp the effectiveness factor.[92]

Broadly speaking, the discussions on multiple ECJ cases about effectiveness centre around or spin-off from the dismay of EU law application at national level. Various ways the questions present themselves in court seem to necessitate different terminology to emphasize the importance of "effective application of EU law" and ideally to fully comply with EU competition provisions. The reason that sends most scholars to ponder the various meanings behind the notions may be the mentions made of multiple terminology in the same case analysis.

However, at a closer glance, it becomes apparent that the use of various effectiveness terminology is mostly made in connection to the principle of effectiveness; that is, removing all

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[89] *Manfredi* , para 71.
[90] *Ibid*,para 61.
[91] See *Courage* , paras 25-29. The Court refers to first the rules to take „full effect", followed by „practical effect"; same terminology was reiterated in *Manfredi* (n 33), paras 60,62 and 64.See also Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* C:2014:1317 (Kone) paras 21, 25 and 26. Court refers to the The full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in paragraph 1 of the Article, and also principle of effectiveness and effective application of competiton law rules.See further C-536/11 *Donau Chemie and Others* EU:C:2013:366 para 21.the terminology „practical effect" used becomes circular by referring back to Manfredi case where no clarification is made by the court.
[92] Havu, (n.72) p.193.

the barriers before the application of EU law provisions to practice the right to damages.[93]The effort spent by the ECJ in this meaning may also outline the sanctions duty it assigns to the private enforcement system.[94]In a more plain sentence, application of EU law with an effective factor may mean a successful damages claim where the claimant is compensated in the full amount claimed, even though such situation may include elements of overcompensation and inefficiencies in the society as a whole.[9596] The interchangeable use of these various notions indicates that a court is expected to consider an extensive list of EU terminology to fit the case in hand for a successful damages claim.[97]

In any case, for the purposes of this study, the interchangeable use of terminology will indicate the effective factor of the national courts. In other words, the level of effort put by the court to evaluate the case based on the above-mentioned notions, will considered to be an effective application of EU law. This also indicates that courts when making use of all available tools and interpretations are applying a "fair effectiveness", to provide relief to all parties involved in cases. [98]Below, first an attempt will be made to describe the notions for further use later in the study.

In the *Courage* case, the notions of "practical effect" and "full effectiveness" were noted. In the pursuit of obtaining damages from a competition infringement i.e. reliance on EU law, the court

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[93] See *Courage*, paras 29-31the principle of effectiveness is emphasized along side the principle of equivalance. Paras, 25-26 the full and practical effects of competition provisions are discussed. See also for example (Kone) paras 21, 24 and 25.

[94] See Section2.1.2 where the various duties assigned to private enforcement law were discussed.Sanctions duty may be best fulfilled by public enforcement mechanisms. See Wils p.484.Furthermore, the incentive to perform sanctions duty by the private enforcement system maybe missing as it pursues a specific mission on its own. See also Havu, (n.72) p.194.The sanctions task was however, was seen as an indispensible part of the private enforcement in case *Francovich*. See: Joined cases C-6/90 and C-9/90. ECLI:EU:C:1991:428 Andrea Francovich and Danila Bonifaci and others v Italian Republic.

[95] See Damages Directive (2014) Recital 13, Art 3 , full compensation does not mean overcompensation within the meaning of the Directive. See section 4.1. for an overcompensation situation.

[96] Also note that in case Case C-360/09 *Pfleiderer AG v Bundeskartellamt* EU:C:2011:389, para 26, the Court sees the admission of leniency documents to those seeking damages as an inefficiency for the competition system.An overcompensation situation that might have occured is not preferred and not seen as an effective application of EU law nor can that be considered a goal of damages liability in EU competition law.

[97] See Havu, (n.72) p.194. where she mentione an implied duty of the national courts to opt for an extensive scope of damages.

[98] See also section 2.2.3.

used the notion of full effect in conjunction with the principle of effectiveness and principle of equivalence. It might also be argued that a reference was indirectly made to "effective judicial protection".[99][100]The same notions were also noted in *Manfredi*[101] case, and again and were directly tied to acting in conformity of the two closely connected principles. Within the meaning of effectiveness, the significance of practical effect, full effectiveness, principle of effectiveness, effective judicial protection, and, principle of equivalence due to its close proximity with principle effectiveness, is seemingly considered the same and with the same goal of facilitating the principle of effectiveness.

The use of the notion of "effective enforcement" on the other hand, can be referring to a different meaning depending on the purpose of the use case and the recoverability of damages. Firstly, when the public enforcement mechanisms are fulfilling the deterrence and punitive task, effective enforcement may refer to national courts to proceed expeditiously and to grant citizens rapid access to national redress mechanisms[102]. This may preclude or exclude some of the national procedural requirements to guarantee compliance with EU law. This interpretation also holds true within the meaning of the concept of "effective judicial protection"[103], as the EU law does not directly deal with the effectiveness factor of judicial protection.[104] The effective factor

[99] See *Courage*, para 25. The court refers to the principles of effectiveness and equivalence, and that the procedural autonomy must not hinder the application of competition provisions. In para 26 court reiterates the Article 85(1) in the meaning that the disapplication of the article is not open for discussion, thereby tying it to principle of effectiveness.

[100] Effective judicial protection remains relevant in each damages case given that a claim is objectively justified. In this case, as a matter of EU law, the road was paved for a damages claim therefore, indirectly indicated a judicial protection.Furthermore, The court referred in para 25 cases Case 106/77 *Simmenthal* [1978] ECR 629, para 16, and C-213/89 *Factortame* [1990] ECR I-2433 para 19, where a clear reference was made to the protection of rights alongside the applicability of EU law under the priciple of effectiveness.

[101] *Manfredi* (n 33), para 60-63.

[102] (2017/C 18/02) Communication From The Commission, EU law: Better results through better application. 2017. p.11-12 This view was supported by Komninos, in The EU White Paper for damages actions: A first appraisal p.86.where he refers to the "procedural" matters being seen as candidates for harmonization through a Directive in the White paper 2008. Also see Nebbia in Damages actions for the infringement of EC competition law: compensation or deterrence? (2008) European Law Review 33, p.24 where she links the concept of private enforcement semantically with compliance to EU law while actions for damages merely represent a claim.

[103] Effective Judicial protection requirements stem mainly from TEU Art 19(1), and the European Charter of Fundamental Rights Art 47. However The right also extends to defendants, and any favouring of the court to the claimant to perform the tasks of sanctions and deterrence maybe problematic from the point of the defendants. See Havu, (n.72) p.197.

[104] See also p.14, and (n. 85-86).

based on this interpretation will be covered in the later sections under the application of quantification methods.

Secondly, in the case of irrecoverable damages due to impossibility of assigning or establishing an infringement or some cases of remote or minor damages, it may refer to abstention from damages awards to invest resources into the public enforcement mechanisms.[105]The latter case of effectiveness will be excluded for the purposes of this study.[106]

The original meaning and the purpose of the principle of effectiveness, as shortly mentioned at the beginning of this section is to prevent the exercise of EU law becoming "practically impossible or excessively difficult".[107] The leaving of the enforcement of EU law to national courts often produces ambiguous results and usually in ends a "Jack-in-the-box situation"[108]. The principle, when used categorically, may serve as a handy tool in reinforcing the remedial discretion of the EC and the NCAs', and finding a balance between procedural autonomy and EU Competition Law remedies.[109] The following categorical approach will be used to assess the effective use of the" principle of effectiveness" later on in this study.

In ensuring the above-mentioned balance, the ECJ has been active in its interpretation of effectiveness principle in various cases. The principle was first discussed in *Comet*[110] *and REWE* [111]cases and subsequently developed further by ECJ in various other cases. The characteristics of the used methods were identified by Norbert Reich under 3 main approaches.[112] Firstly, it is the principle's eliminatory function. Reich notes that together with the principle of equality, the

[105] Remote cases refer to for example „umbrella customers", or difficult multi step assessments.See (n. 283).
[106]The author is of the meaning that, for the purposes of this study, only litigated cases can bring insights.
[107] *Manfredi* , para 71.
[108] Thomas Wilhelmsson refers to a" Jack-in-the-box" situation when the intertwinement of EC law and national legislation may create unforeseeability or ambuigity. See Juho Raitio, The Principle of Legal Certainty in EC Law (Springer 2003). P.75.
[109] Ioannis Lianos, The Principle of Effectiveness, Competition Law Remedies and the Limits of Adjudication. CLES Research Paper Series 6/2014. p.3.
[110] Case 45/76 *Comet* [1976] ECR 2043, paras 13–16.
[111] Case 33/76 *REWE Central Finanz* [1976] ECR 1989.
[112] Norbert Reich, "The Principle of Effectiveness," General Principles of EU Civil Law (Intersentia 2013) p.91.

principle of effectiveness has a negative content, in that they are acting together or separately, to eliminate restrictions to an EU law. This, however, does not mean that they create remedies. Once the national rule has been identified to have a restrictive effect. The competent court must either disapply the national rule or interpret it in conformity with EU law. [113]

Secondly, Reich notes a hermeneutical approach. [114] The approach provides that competent court following the identification of the EU right in need of adequate protection, in a more positive context than the previous approach, develops or points out remedies. This method also ensures the long term protection of the right in question. In the earlier mentioned *Manfredi* case, Reich points out that with this method, the ECJ first identified the right in need of protection, that is, the right to claim damages from infringements of Art (81) of TEC, and moves on to address the scope of the procedure at the member state level, that is, the compensation should be calculated not only for actual loss but also for the loss of profit plus interest.

Thirdly, a hybrid approach was contended which combines the first two approaches. According to Reich, as a general understanding, recognition of EU right should lead to sufficient procedural remedies development. In the absence of these remedies, the national law should be interpreted in the light of the EU granted right. This hybrid approach can be put in motion first by finding the appropriate national remedies in case of violations. Secondly, the remedy will be measured against the principles of effectiveness and equality, thirdly if the measure fails to protect the right in question, it needs to be upgraded to EU standards.[115]

In the *Courage* [116]decision, the ECJ has put private enforcement of EU competition law and principle of effectiveness in the same context for the first time. Pointing at the Private enforcement, Court reasoned that if a right to claim damages for a violation of EU competition law was not facilitated, i.e. a loss cannot be compensated, it would jeopardise the "full effectiveness" of Art. 101 of TFEU. In the previously mentioned *Manfredi*[117] case where the

[113] *Ibid*, p.92.
[114] *Ibid*. p.95.
[115] *Ibid*, p.97.
[116] *Courage* , para.27.
[117] *Manfredi* . para 63.

hermeneutical approach was applied, ECJ developed the *Courage* decision further for its procedural aspects in the context of more effective private enforcement of competition law. These included the causal relationship between the inflicted harm and the violation of EU competition law (causal link), the compensation to include actual loss (*damnum emergens*) and the loss of profits (*lucrum cessans*) plus legally accrued interest, and prevention of unjust enrichment of the victims of the violation. Although the effective application of EU competition law was not yet codified, *de facto*, a frame was drawn for the procedural aspects of the principle of effectiveness in actions for damages. This was a clear demonstration of the importance given to effective private enforcement of competition law in the eyes of the ECJ, thereby indicating it as an integral part of corrective justice.

The principle of effectiveness is now codified in the damages directive under article 4 as a result of a long legislative process.[118] Also noteworthy to mention that the above mentioned considerations, in combination with the more economic approach from the EC[119] has led to the understanding of the whole concept of effectiveness and the application thereof cannot be complete without "effective quantification of damages". This last aspect is naturally tied with the other economical expertise during the quantification process of damages.

2.2.4. Right to full compensation

The first and foremost guiding principle[120] of the White paper preceding the damages directive, the right to compensation has evolved from a principle to an EU wide right.[121] As an integral part of effective damages actions and therefore private enforcement's corrective task, right to full compensation entitles the victims of infringements with compensation to reinstate the victim

[118] See section 2.2.3.
[119] There is a significant shift from mere regulatory law, to economic analysis of law in the EC's approach toward EU Competition Law. This can be seen from the economic analysis, effects based analysis and with the introduction to merger control.See also Dunne (n 39) p.7.where she refers to EC document „A proactive Competition Policy for a Competitive Europe, published 20 April 2004 (COM(2004) 293)", p.7; also Guidelines on the application of Article 81(3) of the Treaty (OJ C101/97, 27.4.2004).For the purposes of this study economical analysis of quantification are excluded.
[120] White paper (2008).
[121] Damages Directive (2014), Article 3

into the position had the infringement not taken place.[122]The entitlement also extends to the indirect purchasers.[123] In the eyes of the Commission this can be ensured by compensating the actual loss, the loss of profits, plus legally accrued interest[124]; principles that were first mentioned in the *Manfredi* case[125].The possibility of seeking "full compensation" was expressly mentioned in the *Donau Chemie* and *Hydrogen Peroxide.*[126]

Following first from *Manfredi* case, and second from the Damages directive, the right to full compensation related framework regarding what can be claimed under the right seems not specific enough. Both instruments fail to address the extent of the damage or the sufficient level of causality the practice of the right requires, to really contribute meaningfully in damages actions. To argue the right to full compensation, one should be able to convincingly map out the relevant legal damage and its direct causation.[127] The relevant supplementary guidelines also fail to "supplement" in this sense by providing mere economic alternates of quantification.[128]

The applicability of the "right" becomes questionable when the above mentioned create inefficiencies through the lack of generic procedural guidelines, or remedial differences at the national level. The ambiguity that occurs with another "Jack-in-the-box" situation is often present in this regard and it may lead to forum shopping in the remote cases.[129] The technical aspects of the extent of full compensation, the possibility of overcompensation which is prohibited , or disgorgement effects the claim might produce on the infringer, does not make the process any easier.[130] In this state of play, where enforcement of EU law being left to member states, the determination of what is full compensation is left to the discretion of the national

[122] *Ibid*, Article 3(2).
[123] Damages Directive (2014), Article 12.indirect purchasers are private entitites who purchase from the second level and beyond of the supply chain i.e. from the claimant.
[124] *Ibid*.
[125] *Manfredi* para 63
[126] See *Donau Chemie* (n. 82) para. 24, and *Hydrogen Peroxide* Case C-352/13 *Hydrogen Peroxide SA v Evonik Degussa GmbH and Others EU:C:2015:335*, para 63.
[127]Havu, (n.72) p.190.
[128] Passing-on practical guide, and the Practical guide on Quantification. See section 2.4.
[129] Some meber states maybe willing to accept jurisdiction even in remote cases.
[130] Damages Directive (2014), Article 3, Recital 13.

courts. Consequently, the question a claimant seeks answer to shifts from "whether I have the right to compensation in full?" to "What portion of my loss can I prove in court?" The answer to that question will depend mostly on the willingness of the national courts to accept different methods applied in the case law of the ECJ. Broadly speaking, the rule of "placing the victim to the position had the infringement not occurred" seemingly will be the only guide for assessment, and it might be too optimistic to expect a "framework" to develop. Additionally, the issue of "legal accrued interest" remains open to determine the extent of full compensation despite the efforts of creative interpretations.[131]

The two questions above also provoke another discussion into the necessity of the word "right". Similar to Nebbia's assertion that the semantical play 'private enforcement' brings with itself indicates a different mechanism of "compliance with rules" than the formulation of 'actions for damages' which is a mere claim.[132] When a claimant is obliged to "comply", there is a clear set of rules while a mere claim to the "right to full compensation" may not be drawn a framework to be assessed within.

The right to damages and full compensation thereof, contrary to many different EU rights, can be relied upon from the moment of an occurred infringement. This nature is different from rights that are readily available such as fundamental rights. The more remedial nature of the right to full compensation adds further disparity to the ambiguity between national rules and EU rights regarding its status as a "right". However, the remedial/measurable nature of the right based on evidence also renders the practice of the right possible.

Van Boom contends that the damages resulting from a competition law infringement are pure economic losses.[133] An economic loss can only be put back in place by utilizing remedies, and this reflects what is expected of this right very clearly. In this connection, categorizing the right

[131] Manfredi para 95.
[132] Nebbia (n. 102).
[133] Willem H. van Boom, The Law of Damages and Competition Law: Bien étonnés de se trouver ensemble?(2010) p.9. available at : http://ssrn.com/abstract=1784808 20.11.2019.

as remediable, i.e. compliable with, favours the semantical meaning of private enforcement over actions for damages. The Commission's silence on the ambiguity between the definition of a right v. remedial right confirms the favouring of economic analysis of law above the traditional characteristics of substantive law. [134] [135]

Another reasoning behind calling the right a "right to full compensation" could be to categorise it together with other EU law provisions that may not be considered anything else than "rights". For example, categorizing the right to full compensation as a remedial right, might bring about the hopeless discussion of how other EU rights should be categorized. The practice of rights in the hands of the NCA's seem to be in need of remedies and those rights would certainly not benefit from such discussion. In any case, the right to full compensation remains an issue of proving the legally provable damage and the causal link between the infringement and the damage. Albeit the claimed amount and the final award may indicate a significance on how effective the practice of the right to full compensation has been, due to the lack of specific meaning of the right itself, it will be assessed together with the establishment of harm and the causal link.

2.2.5. Road to Quantification

2.2.5.1. Who can or should claim damages?

The nature of competition law infringements affects different levels of consumers in the society. The potential victims of infringements can be grouped in five different segments.: Direct purchasers from the infringer, the indirect purchasers who purchase from the victim; umbrella customers, that are buying the same product outside the cartel for the same-high price; customers who would have bought if the price was not so high, and the providers of the infringer, so called upstream providers.[136]

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[134] See for further insights on economic analysis of law Footnote 73.
[135] Among those chracteristics of substantive law, a set of unified EU wide procedural rules, as well as similar outcomes of analysis can be mentioned. However for the relevance of this study further elaboration is deemed superflous.
[136] Impact report p.78.

The harm can be extended in the larger supply chain from the indirect purchasers of the infringing party to the upstream suppliers, or from direct competitors to the umbrella customers who are not even aware they are harmed. [137]Usually the damage is compensable, but "who's and what's" of the recovery process depends mostly on the goals of the competition policy[138]. As studied above, in EU the tasks assigned to private enforcement are not entirely clear. The envisaged system where private enforcement compliments the shortcomings of the public enforcement indirectly contributes to the deterrence task albeit by a limited scope, while the social justice system demands that damages are compensated in the light of the goal of "bringing competition closer to the citizens".[139]The latter vision or task for private enforcement allows a wide array of affected parties to bring actions for damages.[140]

The two main types of harm result from infringements can said to be the deadweight loss (dealt by deterrence task) and the harm sustained by private parties (dealt by corrective task).[141] Deadweight loss is harm done to the welfare directly, while the private compensation will be pure economic losses and does not necessarily create welfare loss. This, however, does not mean that private compensation has no social goal and a wrongdoing can easily be found in cases of intentional infliction of damages. [142][143] In parallel, cases of private harm that is not claimed, a deadweight loss might occur, which would need another mechanism such as disgorgement of unjust enrichment to compensate the society's detriment. [144]Therefore, generically, all potential victims should be allowed to claim damages.

The inclusive theory above also creates a confusion in the application. There seems to be an unclarity among the public enforcers pertaining the tasks of the private enforcement. The focus

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[137] Upstream providers may also be harmed by downstream cartels through decrease in the sales price or supply quantity.See also section3.1.1.1.
[138] Needless to say, that it also stems from the European case law.
[139] Green paper (n.70). See also Jürgen Basedow, Private Enforcement of EC Competition Law, Kluwer 2007. p.165
[140] Lianos (n 86).It can be considered that a "fairness"principle is applied.
[141] Van den Bergh, et..al,(n.59) p.7
[142] *Ibid.*
[143] Willem H. Van Boom, Pure Economic Loss. A Comparative Perspective, Wien/New York: Springer, 2004, p21.
[144] Van den Bergh, et..al,(n.59) p.7

on the deterrence aspect of private enforcement rather than compensating pure economic loss whether it serves a social justice or not, produces insufficient clarity in addressing for example the sufficient extent of causal link or the compensation in full (*restitution in integrum*).[145] This interpretation may also be backed by the silence for clear guidelines from commission regarding those issues.[146]Nonetheless, as a rule, all victims, except for bringing actions by means of a collective redress, are allowed to claim damages from competition infringements.[147] The initial concerns related to a collective mechanism were centred around the fact that such action might 'privatise the production of the public good'. [148] This viewpoint seems to be changing though as the EU parliament is momentarily negotiating the first ever community rules on collective redress mechanisms.[149]

The wide acceptance of victims in court does not immediately entail the contribution to the restoring of the dead weight loss. For a successful claim, proof of the total harm inflicted and a direct causal link between the two is necessary. [150] This requirement eliminates a good number of purchasers whether direct or indirect who have paid more than necessary. Another worthy mention is the consumer segment who would have bought the goods had there been no infringement. Restoration of the dead weight loss caused to this segment would be impossible. On the other hand, the pure economic loss, which is given standing, is relatively easier to compensate with clear guidelines and practices.

The more difficult and remote claims, such as those of umbrella consumers, where the attribution of the award is complex and many layered, means the system may not work efficiently. Referring to earlier analysis, in these cases reallocating sources to enhance the public enforcement may produce better results for competition goals.[151]The overall efficiency should

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[145] See also Jurgita Malinauskaite, Private Enforcement of Competition Law in Lithuania: a Story of Underdevelopment, ThomsonReuters G.C.L.R., Issue 3 2013. p.133.
[146] See unclarities in cases *Courage* , para.27. *Manfredi*, para 60-64, *Kone ,21-26* . See also section 2.2.5.
[147] *Courage* ,para 24. to the procedural aspects clarified in *Manfredi* . paras 53-64.
[148] Van den Bergh, et.al, (n.59) p.5.
[149] See EP press release : https://www.europarl.europa.eu/news/en/press-room/20190321IPR32135/new-rules-to-help-consumers-join-forces-to-seek-compensation 24.03.2020.
[150] See sections 2.2.5.3. and 2.2.5.4.
[151] Havu (n.72) p.194.

accordingly contain elements of detection of infringement and the sufficient source for the claimant once the standing in court is given.[152][153]

The US system on the other hands applies the efficiency factor very often by denying the indirect purchaser standing.[154] In the EU with the decision in *Kone*, the umbrella customers were categorically included in the list of claimants with the right to claim damages. However, the same issue was revisited in the *Otis* case and the emphasis was made that the connection should be direct.[155] As a result, in theory, all victims of competition infringements may claim damages in court on the condition that the causal link is established with the damage.[156]

A separate note should be made regarding abusive enforcement. While the public enforcers act in good faith, the same may not be said about private claimants.[157] Unlike the frequency these actions take place in US, nevertheless, in EU the risk of potential abusive litigation is also present. In the absence of treble damages, some private entities may still claim damages and demand an injunction to halt a given business flow. The damages that may occur due to halting may not be compensable in full and may create a deadweight loss. As a precaution some court escrow account maybe used to limit a potential loss or deny standing for this model cases in damages action.

2.2.5.2.Definition of Harm

The definitions of, harm, compensation, restitution and damages can be semantically different and interchangeable, but legally in different jurisdictions, they may indicate different legal consequences.[158] Given the variety of jurisdictions in the EU, a common definition is difficult

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[152] US system generally denies for instance, umbrella customers standing for efficiency purposes. See Van den Bergh, et.al, (n.59) p.8. Further insight available in cases Hanover Shoe v. United Shoe Machinery Corp. 392 U.S. 481 (1968) and Illinois Brick Co. v. Illinois 431 US 720 (1977) , where in both cases the efficiency consideration denied indirect purchaser standing in the court.

[153] It may also be articulated that some courts with lack of experiences in actions for damages , may use these efficiency arguments to deny cases, and create potential deadweight losses. See. Also Malinauskaite, (n. 145).

[154] *Ibid* U.S cases. Also see Firat Cengiz, Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US? CCP Working Paper 07-21 p.19.

[155] *Kone* , Case C-199/11 *Europese Gemeenschap v Otis NV and Others* EU:C:2012:684 (Otis) para 65.

[156] This is also the case to for the reasons of fairness.

[157] See Wils (n.45),p.13.

[158] See Green Paper Recital 114.

to agree upon. In this impracticality, it may be easier to address what distinguishes damages in form from other well-established definitions that may not be considered as damages.

The definition of harm in EU can be found among the lines of the following: the range/extent of the harm could stem from the principle as accepted in Damages Directive "*placing the victim to the position had the infringement not occurred*"[159]. However, in that it should be kept separate from disgorgement.[160] Also, compensation may not lead to overcompensation whether by means of punitive, or multiple damages[161] and, therefore, cannot be multiplied in amount. What may also be relevant is the function of damages. Reparative function of damages focuses on the losses of the claimant, while the preventive function is to exploit the task of deterrence, by preventing a tradeoff situation between the infringement and damages.[162]The former is of the essence for the claimant while the latter for the public enforcers.

2.2.5.3. Establishment of The Extent of Harm

The theoretical upper limit of compensation drawn in the *Manfredi*[163] case left out the very important aspect of the quantification process the "establishment of the extent of harm". The right to Full compensation is a well-established right, however it can only be reached if the extent of the harm inflicted is estimated.[164] The specification needed to determine the extent of the harm is found in notions set by the ECJ such as full compensation, adequate compensation and commensurate compensation during its earlier preliminary rulings.[165] The terms are used interchangeably, combined or to distinguish, but in any case are largely contextual. The interactions of these notions do not automatically flow from the right to full compensation, hence they are separately studied.

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[159] Damages Directive , Art 3(2).
[160] See (n 65).
[161] Damages Directive Recital 13.
[162] See (n 216).
[163] *Manfredi* para, 31.
[164] Damages Directive 2014.
[165] Katri Havu, *Full, Adequate and Commensurate Compensation for Damegs under EU Law*: A challenge for National Courts? European Law Review, precopyedited version. p.5.

The interchangeable use of the notions, much like the concept of effectiveness, seem to be the case of a semantic interpretation. In *Paquay*[166] case the term adequate was used to underline the need to cover all damages when the financial compensation was found to be the suitable method to punish an infringement of community law.[167] A similar meaning was noted to underline the commensurateness of the damages award with the sustained damage, while underlining effectiveness and deterrence effect of a damages award .[168]Both notions were noting the full compensation principle in the context they were used.

In *Marshall II* [169]case, adequateness of damages award was accepted to have equal meaning to full compensation. The court noted the fact that compensation may also be given by means other than financial, but in discriminatively dismissal cases a financial compensation needs to be made, and to be made in full to make the wrongdoing be *''made good in full in accordance with the applicable national rules.''*[170]It is also worthy to note that the court assigns the duties of deterrence and injunction on top of corrective measures to the upcoming private litigation. The award of full compensation by means other than financial points out the possibility of non-economic measures to reach to full compensation in the context of this ruling. In other words, the full effect of EU law should be reached not only by corrective measures but also by deterrence.[171]

The combined use of the notions on the other hand is based on a very straightforward logic. The notions of adequateness and commensurateness can only be assessed if the upper limit of the damage, i.e. the legally relevant damage accepted to be the full compensation, is determined.[172]

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[166] Case C-460/06, Nadine *Paquay v Société d'architectes Hoet + Minne SPRL*. ECLI:EU:C: 2007:601. *(Paquay)*
[167] *Ibid*, para 46,51.
[168]*Ibid*, para 49.
[169] *Marshall II* ..
[170] *Ibid*, para 26.
[171] In support of this note , the AG's comment is noteworthy. AG Van Gerven the adequateness of the damage is in relation to the damage however does not necessarily mean to equal the total damage. Se Havu, (n, 72) p.16.See also *Paquay* para 45 for the reference to deterrence effect.
[172] *Ibid*, p.15. se also C-407/14 *María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA* EU:C:2015:831.para 4. (*Arjona Camacho).* that court implies there is a direct correlation to extent of full compensation and adequateness.

The correlation however, may prove to be erroneous, if possible at all, given that full compensation is not always awarded by means of corrective justice, i.e. financial awards.[173]

The distinctive function assigned to the notions become visible, when in each context the application of a notion automatically indicates an exclusion of other notions. For example, commensurate compensation may at times mean that loss of profit can be excluded in the calculations which is incompatible with EU law ever since the *Manfredi* decision. In such exclusion, a reversion can be seen to the combined use of the notions to determine the method in reaching full compensation. In *Brasserie* case, the ECJ has underlined to the directed question whether loss of profits should be included in the determining the extent of the damages, that commensurateness may not mean to exclude the loss of profits, and that the damages would only then be meaningfully awarded.[174] Subsequently, this principle was upheld by the court in *Palmisani*, where the court combined the notions and noted that the effective protection of the rights necessitates "commensurate" reparation of the loss or the damage,[175] and that the national court must ensure the "adequate" award for the damages. [176]Nevertheless, distinctive nature of the notions can still be noticed for instance in contextual limitations where commensurateness may indicate lower limits of compensation, while notion of full compensation can have less limiting effect to comply with EU law.[177]

The methods used other than financial compensation to reach full compensation are also indicative of the applicability of these notions in cases other than actions for damages.[178] Similar to the concept of effectiveness, the creative or interchangeable use of these notions seems to be utilized by the ECJ to facilitate the full effect or effectiveness of EU law or the principle of

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[173]AG Van Gerven (n, 171).
[174] C-46/93 and C-48/*93 Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others*. ECLI:EU:C: 1996:79. Para 90. (*Brasserie*).
[175] C-261/95 *Rosalba Palmisani and Istituto Nazionale della Previdenza Sociale (INPS)* EU:C: 1997:351 para, 26, *(Palmisani)*, the court notes the inclusion of the loss of profits.
[176] *Ibid*, para 35.
[177] If the national court attempts to define commensurateness by excluding some aspects , the notion of ful compensation would enhance the scope to bring the definition in compliance with EU law.
[178] See *Marshall II* . Summary point 1.referring the different means available for discrimination cases.

judicial protection .[179] In more specific contexts the notions may also facilitate damages actions by narrower definitions. For example in *Hansson*[180] case the application of the Plant Variety Rights Regulation[181] triggered ECJ to point out that Art 94 of the regulation reflected the principle of "objective and full compensation" and that the loss of profit was irrelevant given that compensation must be in full but on objective basis that it covers "solely the damage which claimant has sustained as a result of the infringement".[182]

Nevertheless, the vague application of the notions and the contextually differing definitions confuses the system and creates uncertainty. This vagueness combined with situations where balancing of rights must take place may create confusion even if a notion is narrowly interpreted. A further confusion can be said to exist is related to the tasks assigned to private enforcement. The ECJ's efforts in combining corrective justice with other tasks of competition law creates ambiguity and confusion in actions for damages.

Regardless of how good of an attempt is made by ECJ on various preliminary rulings, the use of the notions and the extent of the full compensation rests in the hands of the national courts. The varying procedural aspects, albeit tried in the best possible method of compliance with EU law, still makes the damages actions prone to produce different results jurisdictionally and the question of "what is legally relevant?" remains an open one.[183] It is understandable that procedural autonomy can best address many aspects of full compensation principle such as the application of yardstick methods for quantification.[184] Indeed, there is still the need for some level of legal certainty in this field for effective private enforcement.

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[179] See section 2.2.3.See also *Paquay* para 45.
[180] C-481/14 - *Jørn Hansson v Jungpflanzen Grünewald GmbH,* ECLI:EU:C:2016:419. *(Hansson)*
[181] Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights.
[182] *Hansson* , para 40. Court was comfortable to disgorge profits though at the amount that infringer unfairly gained. See para 29. See also Havu, (n, 72) p.12.
[183]Norbert Reich, Horizontal Liability In Ec Law: Hybridization Of Remedies For Compensation In Case Of Breaches Of Ec Rights, Common Market Law Review 44: 705, 2007. Reich mentions and furthers the discussion on the unsuccesful litigations at the national level.
[184] See section 3.3.

2.2.5.4. Causal Link/Causality

The law is in the continuous search of establishing connections between events to establish a pattern and to attribute responsibility in the case of wrongful decision.[185] The basis for actions for damages is no different. The application of "*conditio sine qua non*" principle is essential to private enforcement and is the main principle behind the but-for comparator quantification methods.[186] More particularly, in the EU the embodiment of causality requirement refers to an infringement of EU law while being immediate and exclusive and a cause for the attributable damages.[187]

The diverse liability regimes in the EU just like other requirements of private enforcement, also troubles the causality requirement.[188] The intricate nature of establishing the causal link was first acknowledged for private enforcement in the Ashurst report,[189] followed by the Green paper which hinted the difficulties pertaining the practical and theoretical challenges arising out of the import of the concept of "economic causality" in a legal and factual setting[190]. Since then no clarification or harmonization efforts have been finalised other than the requirement of the application of the twin EU principles of effectiveness and equality.[191]

This intricacy seems to centre around the notion of the acceptability of sufficient causal link. In other words, when court is attempting to implement the principle of full compensation, the degree or the extent of the acceptable causal link is left open to the national systems.[192] Similarly, which is a sufficient event to break the causal link is left entirely to the national courts.[193]The establishment of the relationship between two events has direct consequences to the

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[185] Claudio Lombardi,Causation in Competition Law Damages Actions. Cambridge 2020.p.5
[186] See section 3.2.
[187] Havu, (n. 72) p. 191.
[188] Lombardi (n. 172) p.54.
[189] Ashurst Report p.6.
[190] Lianos (n. 86), p.5, See also Green paper Question N.
[191] See Green paper Section 2.9. White paper section on damages where also the position of indirect purchasers are considered to be very difficult to prove the causal link given the remoteness to the infirngement. But the causality as a concept was not discussed seperately.See also Damages Directive Recital 11 for the twin principles.
[192] Havu, (n. 72) p. 192.
[193] Havu, (n, 165). p.22. Here can actions such as contributory negligence can be considered to break the link from the perspective of the applicable damages' liability provisions.

reparation and may hinder compliance with EU law.[194]The road to the quantification is dependent on the causal link and there is no need to decide on the amount of compensation in its absence.[195]

The task of corrective justice and therefore the compensation assigned to private enforcement, allows the wide interpretation of who should be allowed standing in court.[196]This inclusive approach however, produces different applications, especially in those member states that depart from the general rule of liability and leave the setting of upper limits to the courts.[197] In parallel, some courts may exclude essential mitigating concepts such as duty of care or contributory negligence.[198] The same restrictive approach may also be used for establishing the causal link and may be at the discretion of the courts, meaning that "some categories of harmed individuals or firms may not be able to prove the harm suffered or the causation link" and lead to only direct purchasers to initiate actions for damages, thereby increasing the social harm while limiting the scope of corrective justice.[199]

As a more general view, in the absence of clear rules, the determination of sufficiency of the causal link may be derived from the traditional legal causation and can pursue a more deterministic approach towards causation. [200]This means the utilization of the "all or nothing" approach where it is assumed that a damage has occurred as a direct result of an action. But it has become evident in the past that this type of analysis is insufficient.[201] To complement this shortcoming a stochastic approach was developed, where a victim only had to show that some

[194] That is, for instance exclusion of loss of profits where no causal link was successfully established.
[195] Havu, (n. 72) p. 198. See also Damages Directive Art.12-15.
[196] Lianos(n. 86), p.7. See also section 2.2.5.1.
[197] *Ibid*, p.7 footnote 26.
[198] *Ibid*.
[199] Andrea Renda, et.al. Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Erasmus University Rotterdam, 21 December 2007, p.418. The report indicates the umbrella customers and Indirect purchasers have amounted to a very little portion of the total number of actions for damages. See also Lianos (n. 86), p 44.
[200] Hanns A. Abele, Georg E. Kodek & Guido K. Schaefer, Proving Causation In Private Antitrust Cases, Journal of Competition Law & Economics, 7(4), p.852
[201] *Ibid*, See also Lianos(n. 86), p.18.

damage was inflicted to some people as a result of an infringement[202]. To limit overcompensation an overall amount of damage is determined and attributed to different infringers in complex cases.[203]

Another challenging aspect of the requirement may have semantic explanations. The notions of "causal link" and the "direct causal link" and their interrelations are not studied at the EU level and causes ambiguity. As an example, in *Kone*, the umbrella customers were categorically included in the list of claimants who were given standing to claim damages. Sometime later the ECJ added an ambiguity, noting in *Otis* that the connection should be direct.[204]

A noteworthy difficulty is existent when the causal link may be too remote from the infringement. In the national systems it is usually expected that the damage or loss must be in a reasonable connection with, and not too remote from, the event that has established the liability. This is known as "reasonable attribution". [205] However, subjects of cases where remote causality is present, both proving the causal link as well as defending can be problematic. From the perspective of the defendants, the causal link requirement may be very hard to rebut as the presumption of cartels causing harm extends also to the establishment of the causal link in the case of passing-on defence. In other words, an indirect purchaser can by *prima facie* evidence show that the passing on is occurred once the direct purchaser has proof of an overcharge is paid by them.[206]

From the perspective of the claimants, in causal uncertainty situations other than those where a direct attribution of the damage to specific infringement is possible, different or more collective methods can be utilized. For example in a situation where the liability of multiple infringers is established, a court can move to accept the causal link for the whole being established and

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[202] Hanns A, et.al (n. 200). p..852
[203] See next paragraphs.
[204]See (n.155).
[205] According to Dutch law, particularly the nature of the liability and of the damage caused are relevant in this respect. See the link for a summary actions for damages in Dutch Law: https://www.groenendijk.com/en/practice-areas/all-practice-areas/damages/ 22.04.2020.
[206] Havu, (n. 72) p. 197. See also Damages Directive recital 41.

attribute damages, rather than establishing a separate causal link for each infringer.[207] A similar method can be said to exist where the courts would utilize an "administrative solution" to bypass the causal uncertainty. This approach would use public sanctions systems such as taxes or fines and consequently repair the victims of the infringements.[208]Burden of proof shifting may also provide relief for the uncertainty and for fairness reasons.[209]

2.2.5.5. Passing-on

The potential for overcompensation is a real one and it poses equally damage to the markets and the society as a whole. In the pursuit of preventing overcompensation, emerges the same question as before, "who should be offered standing in court for damages?".[210] Following on from the relevant section above,[211] tied with the fairness principle,[212] every individual should be entitled to claim suffered damages, and all the infringers must be allowed to invoke passing-on defence against the downstream purchasers; and even upstream providers, who are claiming full compensation for their losses incurred through input price reduction .[213] [214]

The passing-on defense excludes a claim for damages where goods and services have been sold further down the supply chain by the claimant, thereby "passing-on" all or some of the losses incurred from its purchase from the infringing supplier. The defense, when invoked, follows the loss and seeks to compensate the injured party, at least in theory.[215] However, it also creates complexity and dampens incentives to launch a claim, as direct purchasers may confront uncertainty regarding the damages when claimed.[216]Also if there is a lack of coordination between courts in different locations, the infringer may be punished too severely, causing

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[207] Lianos(n. 86), p 19.
[208] *Ibid*, p.20.
[209] *Ibidem.*
[210]Ariel Ezrachi, *From Courage v Crehan to the White Paper*, Mackenrodt, Abuse of Dominant Position New interpretation and New Enforcement Mechanisms, 2008, p. 126. See also Lianos (n. 135), p.7.
[211] See section 2.2.5.1.
[212] Firat Cengiz, Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US? 2007, p.8.
[213] See section 2.2.4. and 3.1.1.See also Damages Directive Art 12.2 and 12.3.
[214] Lianos(n. 86), p 43.
[215] Ezrachi, (n. 210) p.128 See also Section 3.1.1.
[216] *Ibid*.

overcompensation or creating loss, which may be in form of a deadweight loss, or loss that effects the general welfare.[217]

Unlike the general case with the tasks assigned to private enforcement of competition law, the choice of the Commission on the passing-on defence seemingly opts for mere correctional form. In other words, barring the defence from standing would result in a sort of deterrent effect where the infringers would feel less free to violate the law, or to trade off the fines from the potential gains.[218] If this policy choice were to be aligned with other elements of private enforcement,[219] the passing-on should not be given standing in court and, albeit limited, the practice of corrective/compensation task of the private enforcement would also realise the task of deterrence.[220] Barring of the passing-on defence may simultaneously create some efficiencies, as it would hand the claims to those who are best equipped to initiate them.[221] In this particular case of passing-on, the Commission's different/reversed policy choice to the assigned tasks, creates additional complexity to actions for damages.[222]

In accordance with the principle of effectiveness, the national legal systems utilize procedural presumptions to facilitate the additional "fairness complexity".[223] For example in Dutch Civil Code Article 193p and 193q considers the overcharge to have passed on where an infringement of competition law has taken place and led to an overcharge to the direct purchasers, and where an indirect purchaser has purchased goods or services that are object of the infringement, or goods that are derived from the objects of the infringement.[224] Such presumptions allow both

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[217] Josef Drexl Consumer Actions After the Adoption of The Eu Directive on Damage Claims For Competition Law Infringements, Max Planck Institute for Innovation and Competition Research Paper No. 15-10, 2015, p.12
[218] Willem H. van Boom, The Law of Damages and Competition Law: Bien étonnés de se trouver ensemble? Erasmus School of Law, Rotterdam 2010. p.12
[219] See section 2.2.5.
[220] Cengiz (n. 212) p. 8.
[221] Conversely, allowing the passing-on defense when the proving of the overcharge becomes impossible for the harmed party, maybe unjustified as it would mean the infringer is unduly freed from the harm he caused. See: Alison Jones, Brenda Sufrin, EU Competition Law: Text, Cases, and Materials, Oxford 2014, p. 1117.
[222] Van Boom, (n. 218). p.12
[223]The provisions are based on the Damages Directive, Art 14.
[224] See the proposed Dutch legislative changes for a short overview in the context of the Damages Directive: Dutch official gazette (In Dutch):https://zoek.officielebekendmakingen.nl/kst-34490-2.html .20.04.2020.

indirect and direct purchaser standings as well as passing-on defense so that the claimants at two different levels in the supply chain and the defendant may receive compensation/relief at their corresponding losses and not at the expense of each other.[225]Similarly, the infringers should not be excessively punished to the extent that their contribution to the overall welfare starts to include counting losses.

2.3.Elements for Effective Quantification of damages

Having studied the compounds of the road to quantification above, the effectiveness of actions for damages can be measured under two main headings: by fulfilling the "tasks assigned to private enforcement of EU competition law"[226] in the light of the doctrine above developed by the ECJ, and by ensuring the practice of right to full compensation by fulfilling specific procedural requirements set out by the ECJ, combined with the appropriate methods of quantification. Below the legislative tools will be reviewed before moving onto the empirical quantification methods and the examination of the recent national case law based on these two main headings.

2.4.Tools on the road to Quantification

The framework of the road to quantification of damages is facilitated by the binding Directive on Actions for Damages[227]. The Directive is assisted by two guidance papers on Communication on Quantifying Harm[228] accompanied with the Staff Working Document[229]; and the Practical Guide on Passing-on of Overcharges[230]. Other EU law and relevant case-law from the ECJ and the twin principles of effectiveness and equality compliments the damages disputes[231].

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[225] Cengiz (n. 212) p. 8.
[226] See section 2.2.1.
[227] Damages Directive (2014).
[228] European Commission (2013/C 167/07) - Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union.Accompanied with SWD (2013). (Guidance on Quantification).See section 2.4.2.
[229] White Paper (n.4).
[230]Study on the Passing-on of Overcharges. Prepared for the European Commission, RBB Economics, Cuatrecasas,Goncalves Pereira, (2016). Guidance on Passing-on (2019)..
[231] See Havu (n, 72) p.189. Some relevancy found in ECJ case law in cases other than actions for damages indicates a wider scope of cases will be accepted during damages actions.

2.4.1. Directive on actions for damages

The Damages Directive is transposed to national legislation of member states at the end of 2016[232]. The complexity resulting from the interchangeable use of the tasks assigned to competition law for the purposes of earlier identified "fair effectiveness"[233]becomes apparent from the first Article of the Directive. In line with ECJ case-law, Article 1 mentions that the directive pursues two ultimate goals, a) right to full compensation for all victims, thereby indicating all the potentially harmed individuals down the supply chain (fairness principle) and, b) fostering of undistorted competition in the internal market. [234] Consequently, it moves on to establish the right to full compensation and the twin principles of effectiveness and equality.[235]

The two goals of the directive are formulated as such that they complement each other. The fostering of the undistorted competition in the internal market will be realized or complemented, by means of every individual's right to "private enforcement". In other words, the deterrence task will also be assigned to Private enforcement of competition law even though the task can be served better by different methods.[236]

An important principle to note is that while compensation being the main tool for reaching the directive goals, it may not lead to overcompensation. Article 3(3) prohibits the possibility of punitive and multiple damages, as well as Article 12 (2), which sets out the principle that '*compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level'*.[237]The rule while contributing to overall welfare, may limit the extend of the deterrence task in the hands of private enforcement demands a sensitive balance from the national courts.[238]

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[232] Directive was officially signed on the 27th of December 2014.
[233] See section 2.2.3.
[234] Damages Directive Art 1(1).
[235] *Ibid* Art 2-3.
[236] Drexl (n. 217), p.2-3.
[237]Damages Directive Art.3,12. See also *Ibid*, p.12.
[238] This would be the case iif the plaintiffs are not incentivized by high amount of compensation.

According to the Directive, the needed balance can be stroke by utilizing the passing-on defense and giving indirect purchasers standing in actions for damages.[239] The procedural difficulties for the claimant on the burden of proof were addressed by the Commission in the proposal by leaving the burden to the defendant.[240] However, to prevent overcompensation, EU legislators have added the possibility of reasonable request for proof also to the defendants, to assess the overcharge passed-on from one indirect purchaser to the other.[241]The facilitation of burden of proof for a successful claim or defense seems relatively easy as compared to unharmonized or "unincluded" requirements in the Directive of "causal link" and "extent of harm" which are necessary and essential elements before reaching to the quantification phase of damages.[242]

Nevertheless, some relief was included in the Directive when procedural simplicities were introduced with the rebuttable presumption of "Cartels cause harm", and the presumption of the passing of the overcharge.[243] [244]The causal link requirement may be bypassed when there is a cartel identified[245], and clear situations where passing-on is deemed to have taken place can find ground in the national legislation only to easily apply and encourage damages actions.[246] The plaintiffs may be more willing to make use of these simplified procedures to claim compensation; however, the wide variety of the national court's application may still deter them from filing their cases.[247]

While the tasks assigned to Private enforcement are mixed and contextual, the procedural aspects of effective application of the right to full compensation, was left to national courts. The

[239] Art 13.,See also section 2.2.5.1.
[240] Also the difficulties regarding burden of proof at the indirect purchaser levesl were acknowledged in the White paper (2008), damages section.
[241] Damages Directive (2014) Art.13. See also Drexl (n. 225)p.13.
[242] See section2.2.5.3.
[243] Damages Directive (2014) Art.17(2), and 14(2).
[244] However, what is understood under the presumption maybe different per member state such as procedural or substantive . See the example of Hungary for the former and Portugal for the latter : Barry J. Rodger, Miguel Sousa Ferro, Francisco Marcos, A Comparative View of The Implementation Of The Eu Antitrust Damages Directive In Sixteen Member States, Working Paper IE Law School AJ8-243-I, 2018 p. 21.
[245] See *Kone* , para.10. where even an umbrella customer could claim damages from a non-cartel member.
[246] For example, Dutch law adopted three situations in o domestic law and actively using it.See aslo (n. 212).
[247] Drexl (n. 217)p.20.

various applications of the Directive articles at the national level, joined with the requirements in reaching the full compensation (i.e. the procedural requirements of harm, causality) makes the fulfilment of assigned tasks undoubtedly difficult. It can be said that the Directive chooses to address only some of the standing issues and invokes the procedural autonomy principle too often. The reluctance in defining clearer guidelines may be considered as a slow process of minimal harmonization of procedural and substantive aspects of private enforcement, and effectiveness principle seems to be the biggest concern in the eyes of the EU legislator.[248] Even in such setting some harmonization of the procedural aspects could have benefited private enforcement more than principal formulations that were, otherwise, already apparent from the case law.

2.4.2. Communication on Antitrust Harm and Practical Guide

In relation with the principle of Effectiveness, the right to damages may not become extremely difficult or impossible to practice. It was this idea that triggered the Communication on Antitrust Harm and the accompanying practical guide.[249] The communication is purely informative and sets forth the principles of application, definitions, and the preferred interplay between the national courts and EU law during the damages quantification.[250] On the guidance paper, the quantification process is studied based on the examples of empirical methods, their strengths and weaknesses as well as based on practical examples to guide the national courts. These methods are studied in more detail in the later sections.

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[248] Francisco Marcos, Professor of Law at IE Law School, available at: https://lawahead.ie.edu/a-more-favorable-legal-regime-for-antitrust-damages-claims-in-the-future-implementation-of-the-eu-antitrust-damages-directive-in-sixteen-member-states/ 01.05.2020. Alternatively it may be a no process at all and that the remedial solution will only be expected from national level and balance in time. See: Magnus Strand, The Passing-On Problem in Damages and Restitution under EU Law.Elgar 2017, p.262.

[249] Guidance on Quantification .

[250] *Ibid*, recital 12. The real use case may depend on the national application that, unlike the Damages Directive which covers national competition law when applied, these soft law instruments cover only Art.101 and 102 of TFEU, and in case of conflict it is up to the national court to decide whether the guidance have any impact to the court's quantification , if at all. See ; Strand (n.250), p.275 footnote 67.

2.4.3. Study and Guidance on Passing-on of Overcharges

The procedural uncertainties mentioned in above sections has also led to the study on Passing-on of overcharges. The main motivation behind the study was to extend the similar support that was expected of the earlier practical guide on the damages quantification to the field of passing-on calculations. The study thoroughly covers the economic aspects of the passing-on assessment and finalised with a checklist for judges.[251] The critical issues as were identified above in sections related to causality and passing-on which stand central to the damages assessment, were however, not clarified in the study to allow interpretations of EU law while applying the national law.[252] On 1 July 2019, the European Commission published the official guidelines for national courts, outlining how to estimate the passing on extent. The guidance includes an overview of the theory of passing-on, and techniques for assessing the extent of pass-on, as well as recent case law from member states. [253]

According to another view, the hard work dedicated by the Commission to produce the guidelines was related to its intentions of preventing any economic difficulty to be used as a shield by the infringers to avoid liability. However, this position is contrary to the intentions of the Damages Directive, where over-compensation is more of a concern than the distribution of liabilities to wrongdoer and thereby, reflecting that, public and private enforcement should complement one another; but at the same time, the deterrence task is put one step ahead of the corrective task, i.e. right to full-compensation, by preventing over-compensation.[254] [255]

2.4.4. National Legislation

In the Damages Directive, national courts are equipped with the remedial discretion for the actions for damages. This means the national courts have a very large room for manoeuvring to comply with EU law, i.e. practice the principle of effectiveness. [256] Its noteworthy that a final

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[251] See (n 228) Guidance on Passing-on (n. 2019) p.181.
[252] Havu (n.72), p.189
[253] Guidance on Passing-on (n. 2019).
[254] Preventing over-compensation would allow all the harmed individuals to claim damages, and contributes to the overall and prevents creating losses to teh overall welfare by punishing the infringer excessively. See, section 2.2.5.5.
[255] For the viewpoint see: Pier Luigi Parcu , Giorgio Monti, Marco Botta, Private Enforcement of EU Competition Law: The Impact of the Damages Directive, Elgar, 2018. p.67-68.
[256] Havu (n. 72), p. 189.

decision taken by a NCA or an appellate court decision may not be refuted in front of a national court in a given actions for damages.[257] If the decision is originating from another member state, the national court must consider the decision at least *prima facie* evidence alongside the new evidence to be submitted.[258]

3. Types of damages and Effective application of Empirical Quantification Methods

The limited deterrence task of private actions for damages also bring infringements into light where the Competition authorities either, do not choose to pursue, or do not have enough sources to investigate. However, starting from the earlier years of the private enforcement, only twenty five percent of EU level convictions were followed-on with actions for damages" [259] [260]. This is mainly due to the lack of clear guidelines regarding the substantive law which was not perfectly bettered with the new Damages Directive. The result was legal uncertainty and therefore under-over compensated or abusive actions for damages. [261]

Another important aspect of the actions for damages is the actual quantification scene and while there are number of methods to quantify, it is still a very intricate process. The release of the Guidance for quantification and the Damages Directive had no significant quantification related improvements for the claimants. This section will make an attempt to demonstrate the possibility of emergence of damages, the group of victims that are likely to suffer harm, and the complexities surrounding the quantification of damages. The application of the methods will be studied with references from case law from both United States of America and EU and the policy choices regarding the tasks assigned to private enforcement will be scrutinized.

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[257] Damages Directive (2014) Art 9 (1).
[258] *Ibid*, 9(2).
[259] Follow-on: referring to an action for damages following an established infringement by a court or a National Competition Authority.
[260] European Commission Press release – 17.04.2014.
[261] Abusive action: referring to an action where the claim is either unmeritorious, or intentionally started damages action to prevent business of a competitor.

3.1. Types of Damages

The EU Competition law provisions centre around two main types of infringements that produce damages: Agreements with the object of restriction competition, and Abuse of Dominant Position. [262] When an undertaking engaging in anticompetitive conduct the restrictions caused in the market can vary from welfare losses to limitations of output. The primary goal of the infringers is to soften the competition.[263]

3.1.1. Cartel Damage Situations

Cartels are formed when companies collectively come to an agreement to fix market prices and maximize their profitability. Some examples of cartel formations can be market sharing agreements, where undertakings agree to allocate a geographic market to a given competitor that becomes a monopolist[264]; bid-rigging cartels where undertakings agree on a higher price to offer on a given procurement and thereby causing harm; or for instance forming a cartel basically to restrict the output in the market. Restricting the output in the market produces a corresponding increase in price and typically shows similarities with price-fixing cartels.[265] Damages caused by cartels can be extensive depending on the abovementioned scenarios. The magnitude of the price increase, the reduction in the output, and the duration of cartelization are essential elements in determining the extent of the damage. In most of these instances, the result is higher prices paid by direct purchasers or consumers down the supply chain and lower quantities than a situation absent the cartel.[266]

In a cartelized world, economists are usually concerned with two types of adverse effects: welfare losses and transfer of so-called "economic rent".[267][268] Welfare losses occur when parties to a cartel increase the price on a given good and profit the same amount by producing less of

[262] Artilces 101 and102 of TFEU.
[263] Ashton(n 3) p. 403.
[264] Oxera, Asimmakis Komninos, et.al. Quantifying antitrust damages Towards non-binding guidance for courts.(Oxera report)(2009) p.15.
[265] *Ibid*.
[266] Ashton(n 3) p.404.
[267] "Economic rent" can be attributed to an additional amount earned than what is economically necessary.
[268]Ashton(n 3) p.406.

the same good. This quantity effect is the primary concern for competition law and may reduce choice and quality.[269][270] The latter effect occurs when the transfer of an excess price amount to undertakings forming the cartel. This "overcharge" does not have a significance in the efficiency calculations but should be considered as damage to the consumer.[271]Both of these adverse effects are typically present in a cartel situation; however, proving the quantity effect may be more difficult in a real-world scenario as its more straightforward to prove the goods that were bought at an increased price than those would have been bought had the cartel not existed.[272]The total amount of damages are considered to be the sum of both inefficiencies.[273]

Further damages caused by the cartels can be related to production-related inefficiencies. A cartel situation may hinder the involved undertakings to search for a more cost or technology efficient solution and thereby allow other non-efficient competitors to stay in the market. The reduced incentive can extend to innovative capabilities and reduce the R&D investments of an undertaking[274] and lead to barriers for entry in cartel covered market as the cartel would be incentivized to stabilize the cartel. These types of inefficiencies my subside for long periods of time.[275]

The average cartel caused damages are preferred to be calculated based on the percentages. This allows the purchaser to calculate its damages easier by applying the relevant percentage to the total amount they paid.[276] The amount of the average percentage of damage was found to be around 20% of the actual price, in a study conducted in 2008. [277]

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[269] The same effect is often named in the economic literature as Deadweight loss.
[270]Ashton (n 3) p. 406.
[271]*Ibid.*
[272]*Ibidem.*
[273]*Ibidem.*
[274]Although one might argue that higher profits can lead to an increased incentive to invest in R&D activities.This was however argued against by Andrea Guenster, Do cartels undermine economic efficiency? 35th DRUID Celebration Conference 2013 Available at: https://conference.druid.dk/acc_papers/r562i7l5lf7hp9rv11dnahc0spep.pdf 01.06.2019.
[275] Ashton(n 3) p.410
[276] Oxera, p.14.
[277] John M. Connor & Robert H. Lande, Cartel Overcharges and Optimal Cartel Fines, in 3 Issues In Competition Law And Policy 2203 (ABA Section of Antitrust Law 2008) p.2211.

3.1.2. Who is affected by cartel damages?

Cartel damages impact both the vertical and horizontal relationships of the cartelized undertaking. At the horizontal level firstly the producers in the same goods market, regardless of the fact of being cartelized are affected from the damages.[278]In other words, any direct competitor with the possibility to enter into the cartel can be affected. Secondly, producers whose goods can be substituted to the higher-priced good can be affected. This may not sound logical as the substituted goods are usually cheaper in nature, but some producers choose to apply "cellaphane fallacy" that is, to offer the product with some cheaper versions, only to charge more for another version of the product.[279]As a result of the cartel, the buyers will only opt for the cheaper product causing damage to this producer.

In the vertical relationships of cartels, any undertaking providing goods directly or indirectly to the cartelized undertakings as well as any direct or indirect purchasers from the cartel are potentially effected by cartel damages.[280] In the case of providing goods directly, the undertakings may need to agree on lower sale prices of their goods as there would not be any other buyer in the market than the cartelized undertakings. Also, the demand for cartelized products will reduce and will result in lower quantities of input for direct providers. Both situations can be classified as loss of profits. Indirect providers, on the other hand, will be passed-on the level of price or quantity reduction by the direct providers of cartelized undertakings. The damages direct or indirect providers suffer are called upstream effects.[281]

Furthermore, as a part of the upstream effects, the direct providers whose input to the cartelized undertakings has become lower, tend to supply their goods to undertakings that produce substitute goods to the goods supplied by the cartelists. [282] This type of umbrella effect [283] causes damage to the direct providers of the substitute goods producer and to indirect providers in their supply stream.

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[278] Ashton (n 3) p.412
[279] *Ibid.*
[280] *Ibidem.*
[281] *Ibid.* p 413.
[282] Substitute goods are interchangable. If the price rises in one product the demand rises in the other. Oxford dictionary of Economics. p.451.
[283] Ashton (n 3) p.414. Umbrella effect refers to subtitute producers price increase as a result of pricing umbrella opened by the cartel.The umbrella allows for higher prices, However, in this case there is a reduction in price, as they can receive good cheaper from the direct providers of cartel. due to the cartel..

In the case of purchasing directly from the cartel, the direct purchasers suffer damages by the price increase. To the extent these purchasers pass-on the higher prices to their customers/purchasers (indirect purchasers of the cartel), they might be reducing or increasing the cartel effect. Usually, higher prices applied to their goods indicate a quantity restriction and therefore, damages. The same situation is also valid for the indirect purchasers of the cartel, as they have to pay higher prices to buy from direct purchasers of the cartel.[284]These damages the direct or indirect providers suffer are called downstream effects.[285] Similarly to the situation in upstream effects, the substitute goods to the cartelized goods produced by undertakings outside the cartel, become attractive due to their lower price. The non-cartelized undertakings can take this opportunity and raise their prices which in return will damage their direct and indirect purchasers along their supply chain by charging high prices and reducing quantity.[286]

Other damaged groups of undertakings are those who produce complementary products to the cartelized product market. These can be batteries to torch market or cartridges to the printer market. These products are only sold to complement other products and will also be severely damaged from a quantity reduction cartel produces.[287]

While the abovementioned groups are the most clearly effected parties and tend to take action the most in courts[288], the general equilibrium theory tells us that cartels can influence the whole economy by changing the prices and causing substitutes, similar to a stone thrown into a pond and causing waves to the entire pond.[289][290]

[284] *Ibid*, p.415.
[285] *Ibid.*
[286] *Ibidem.*
[287] *Ibid*, p. 417.
[288]Oxera, p.15.
[289]*Ibid*, p.413
[290] General Equillibrium Theory considers all markets simultaneously and no change in any market should benefit any party. Oxford (n 282), p.196.

3.1.3. Abuse of dominant position damage situations

The abusive conduct related damages can take two forms: exclusionary and exploitative damages.[291]

Exclusionary damages result from excluding an existing or potential competitor of a dominant undertaking from exercising its freedom to compete in a given market. The excluded undertakings are usually prevented entry or forced to exit the market altogether.[292] The damage can extend from the profit loss of the excluded undertaking to the end-consumers, if the conduct in question causes a reduction in the competition which leads to higher prices, a reduction in choice, or a reduction in quality.[293] These type of damages can result from various abusive conducts such as predatory pricing, tying and bundling, refusal to supply and margin squeeze.[294] Unlike the cartel damages, exclusionary abuse damages may subside over time. The abuse is likely to last only until a potential competitor is forced to exit the market after which the conditions may return to normal for end consumers.[295]

Exploitative conduct related damages usually arise as a result of excessive pricing. Similar to cartel damages, excessive pricing causes utility and profit losses due to high prices. The pricing strategy, however, may also include predation, in which case the prices initially will drop, and the damage from high prices will occur until after a specific predation goal is realized.[296]

3.1.4. Who is affected by Abuse of Dominant position damages?

In the case of exclusionary conduct, the damages are borne mostly by the direct competitors to the dominant undertaking. Practices such as predatory pricing or rebate schemes may have a direct bearing on competitors' revenue and may cause them to exit the market[297]. Their exit or loss of revenue will cause the suppliers of the excluded competitor a loss of profits due to the

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[291] TFEU Art.102.
[292] Oxera, p.17.
[293] Oxera, p.17.
[294] See Section 2.2. These types of abuses are the enforcement priorities of Art 102 on the European Comission's guidance paper. See: OJ C 45, 24.2.2009 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings .
[295] Ashton (n 3) p.426.
[296] *Ibid.*
[297] *Ibidem.*

reduced quantity of products sold.[298] Potential competitors that are denied entry to the market due to barriers by the dominant undertaking are suffering potential profits as damages as well.[299]

The similarities of damages between the cartel and exploitative conduct damages also extend to the actors that are likely to be damaged from this type of abuses. By analogy to cartel damages, the direct and indirect purchasers, the direct and indirect providers of goods to the cartel are the first to be recognised to suffer damages.[300] The providers of complementary goods and the direct and indirect purchasers of undertakings that supply substitute goods to the goods produced by the cartel are also among the parties to suffer damages.[301]

3.2. Empirical Methods of Quantification of Damages

The methods of quantification form another very important component of the actions for damages. Its importance was showcased in the *Courage and Crehan*[302] case, where the ECJ confirmed the distinct right to claim compensation for suffered damages and tasked the national court with calculation and assessing the extent of the damages. After the return of the proceedings to England, the High court noted that the issues relating to damages calculations were not argued before the House of Lords, and consequently did not arise for decision.[303]In other words, in the absence of the of the methods for quantification, the case was inconclusive. The quantification of damages of a specific claim may commence after the competition law infringement is detected, the causal link between the infringement and the damages sustained is established, and the attributions of the damages to the victims are identified.[304] The primary method in the quantification of damages is to compare the existing infringement situation to a hypothetical counterfactual world that prevailed in the absence of an infringement.[305]A comparison between the but-for world provides the details on the economic activity and allows

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[298] *Ibidem.*
[299] *Ibidem.*
[300] *Ibid*. p.427.
[301] *Ibid.*
[302] *Courage and Crehan* .
[303] *Ashton (n3)* p.428.Following the European judgment the case was proceeded in High Court, Court of Appeals and House of Lords in England.
[304] See also section 3.1.3.3.
[305] *Ashton (n3)* p.428.

estimation of damage based on the scenario but-for the infringement[306]. Frank Maier-Rigaud and Ulrich Schwalbe claim that regardless of the nature of the infringement, the methods applied for quantification of competition law damages are always based on but-for comparator models, as the only difference is whether the comparator is theoretically constructed or taken from an existing market.[307] This may also mean that these comparison can be done best in the hands of the national courts. The methods reviewed here are categorized in line with the type of damages covered in the earlier section which in turn was based on the numerical order of the main competition articles in TFEU. Although several potentially applicable methods may be available in each case, the "correct" method may be open under EU law.

3.2.1. Quantification of Cartel Damages

In creating a counterfactual scenario that is comparable to the cartelized market some elements such as but not limited to, time, geographical coverage and prices can be used.[308] In a situation where none of these elements is reliable or available, an artificial market situation may be created based on industrial organisation theory.[309]Consequently, the relevant empirical method for quantification may commence.

3.2.1.1. Time comparator approach

The time comparison approach is meant to be applied to the same market but in different time periods. The two different timeframes are before and after the cartel periods.[310] It is usually easier to identify the price difference as the conditions in the counterfactual and the real world remains the same.[311] The main indicator is the average prices before and after the infringement.

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[306] Theon Van Dijk & Frank Verboven, Quantification Of Damages, In 3 Issues In Competition Law And Policy 2331 (ABA Section Of Antitrust Law 2008), p.2332.
[307] Ashton (n 3) p.428.
[308] Staff Working Document (2013) p.15.
[309] *Ibid.* Industrial organization refers to a field of economics dealing with the behaviors of undertakings and regulatory policy choices.
[310] Staff Working Document (2013) p.46.
[311] Ashton (n 6) p.431.

However, if it is not possible to determine a cartel-free period prior or after the cartel, an alternative "during-and after" approach may also be used[312].

While the application of this approach is rather simple, in practice it does not hold well[313]. The main difficulties are regarding the determination of the exact cartel period.[314] For example, the cartel may have raised the prices very slowly, or the data regarding the cartel commencement may be erroneous[315]. Similarly, if only the average before and after price levels are used the outcome may be erroneous in a price war situation. Such situations usually indicate a post-cartel moment, but may also occur during the cartelization as the involved undertakings may not be able to distinguish low demand periods caused by their own business cycles.[316] Conversely, if a cartel end date was marked during an increase in imports of products, the price drop does not necessarily indicate the end of the cartel.[317] Although, as a model, the before and after situations are identical in market conditions, other variables regarding cost and demand, such as prices of substitute goods, input costs and the application of Lerner index[318] are involved alongside the statistical data in used.[319]For example, by using regression analysis, which studies the relationships between variables, it becomes possible to understand the formation of the price but-for the cartel and is very helpful in determining the overcharge. This method is called the forecasting approach. [320]

Furthermore, the prices after the cartel episode can be deceptive.[321] Firstly, the cartelists that are expecting actions for damages may keep their prices high after the cartel to demonstrate less amount of profit losses which can lead to lower damage claims.[322]Secondly, after a cartel

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[312] Hans W. Friederiszick, Lars H. Röller – Damages actions for Antitrust Infringements (ESMT Working Paper, 2010). P.11.
[313] Ashton (n 3) p.431.
[314] Hans W.Friederiszick, (n312)
[315] Ashton (n 6) p.431.
[316] Hans W.Friederiszick, (n 312) p.21.
[317] T.van Dijk, F.Verboven, Quantification of Damages, 2005, p.9.
[318] G. Monti, EC Competition Law , Cambridge 2007, p.87. Variables refer to a quantity that is liable to change. It may be quantities of goods or sale prices. See Oxford Dictionary of Economics Oxford, 1997.
[319] T.van Dijk(n 317), p.9.
[320] Ashton (n 3) p.433.
[321] *Ibid*.434.
[322] *Ibid*.

episode, the reduction in the prices can be drastically low, not reflecting market realities. Both situations may necessitate focusing only to before cartel periods for calculating overcharge.

Lastly, when a bundle of products are used as variables, it can be deceptive if they're not appropriately analysed.[323]The average prices before or after cartel may change, simply because the relative quantities that form the products or the bundles may have changed and correspondingly their sale shares may have dropped out of proportion. This situation may impair the determined average prices or hide cartel effects. [324]

3.3. Yardstick Method

As the name speaks for itself, the method uses a "yardstick" to reach out to a similar cartel free market with comparable market characteristics to apply before-after model. Cartel-free market can be within the same country, sector and/or markets with similar market structures. It would even be possible to use a generalized framework where many other cost and demand variables are involved in the assessment[325].This would be favourable, as real life scenarios can be better reflected to the assessment and the market conditions can be better assessed. This however would often come at a significant cost as determining the variables in different countries as it requires more effort and time. The variables should be once again motivated or based on sound economic principles for the reasons explained in the previous section.

In both the U.S. and EU applications of yardstick method, a higher rate of attention is paid to the "similar market" as it may not be in anyway affected by the Cartel agreement and the umbrella effects. In internal markets where the aim is to unify the market and different sectors under one, this may become a challenging task especially in cases where multi-national companies are involved which act through their subsidiaries throughout the internal market. However, where the comparable markets are clearly defined and not affected from umbrella effects, the quantification of the damages is easier. In the U.S supreme court case Zenith Radio

[323] *Ibid*.436.
[324] *Ibidem.*
[325] T.van Dijk, F.Verboven, (n 317), p.10.

Corp. v. Hazeltine Research, Inc.[326] where Zenith filed for damages on the alleged exclusion of its imports to Canada; the Court allowed the economic experts of the Zenith to calculate the but-for analysis based on the Zenith share in US and quantified the damages at 16% rather than the 3% during the infringement that wold have been the case in the absence of the infringement.

3.4. Cost Based method

This method takes as reference the normal market conditions and strives to find the normal functioning market costs. The costs of the affected product under the normal conditions is added by a reasonable profit margin and the result would help understand the existence of a cartel situation. This application of but-for analysis is often called "bottom-up" approach.[327]

On the other hand, the real-life cost analysis, input costs, or the costs based only on accountancy, do not reflect the real-life scenarios and may be prone to deliver erroneous results. The determination of the profit margin is not a practical or easy task, as the normal margin only becomes available if one first applies empirical methods to come to normal market conditions followed up by product and company specific margins[328]. However, the Commission's position on this is slightly different, as it suggests in the German Paper Cartel Case[329], where the court held a margin derived from a similar undertaking in a comparable geographic market not affected by the infringement which indicated profit margin.

Furthermore, as pointed out in the Commission's practical guidelines[330], different types of production costs may be applicable to different types of sectors. This may require different set of rules to become applicable, as otherwise the calculations could be rather straight forward, and may only be applicable for a sector where only one type of product is produced.

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[326] U.S Supreme Court Decision - 395 U.S. 100, Zenith Radio Corp. v. Hazeltine Research, Inc., (1969).
[327] H.Friederiszick, L, Röller – Damages actions for Antitrust Infringements ESMT Working Paper, 2010. P.12.
[328] *Ibid.*
[329] Federal Court of Justice Germany No KBR 12/07 referring to the profit margins generated in 'comparable industries'
[330] Guidance on Quantification, ,Recitals 108 and 109.

3.5. Simulation Method

This method is quite closely related with cost-based method as it requires to some extend same information. The market based approach – as the Commission's guideline refers to it- aims to simulate the profit margin by applying different variables and market situations such as demand and cost elasticity.[331] The simulation creates an artificial market where it can carry out counterfeited situations and find answers to but-for analysis. Recently the Asphalt Cartel case in Finland, which is the largest private competition law claim made by use of simulation method, where the court analysed the relationship between the variables and decided on the overcharge being %15.[332]

The simulation has proved to be very helpful by making economic assumptions which decisions are based upon transparent, [333]it helps court to process information within a reasonable time frame transparently and therefore allow courts to apply higher legal standards. This characteristic has widened its application also on merger analyses[334]. Additionally, combination of simulation and cost-based models is regarded more favourable rather than substituting each other, as the cost-based margin could than focus only on the competitive margins[335] and may not need the application of other empirical methods to find the normal market situations. An example was found in the Netherlands where Dutch jurisprudence prescribes a similar abstract damage calculation in which the calculation abstracts from some circumstances . For example, property damage is calculated in an abstract manner and based on the objective repair costs, with or without any actual repair of the property or material.[336] [337]

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[331] Cost elasticity refers to proportional ratio changes between the variables; in this case the costs.See also Oxford Economis Dictionary (n 282).
[332] Finnish District Court - 09/10623, OCL 127 (FI 2013) Municipality of Helsinki v Lemminkäinen Oyi and VLT Trading Oy
[333] T.van Dijk, F.Verboven, Quantification of Damages, 2005, p.13.
[334] *Ibidem.*
[335] *Ibid*, p.12.
[336] See for the commentary Groenendijk Kloppenburg Advocaten. Available at : https://www.groenendijk.com/en/practice-areas/all-practice-areas/damages/ 22.04.2020.
[337] See (n 364) *Stichting Cartel Compensation v Koninklijke Luchtvaart Maatschappij N.V. et.al* case where the abstract calculation was first utilized.

3.6. Passing-on Quantification

Similar to Simulation and Cost-based quantification, pass-on quantification's two empirical methods also involve analysis based on input and price related calculations, and a model of the market where the plaintiff is active. The latter sheds light on the structural determinants of the anti-competitive behaviour and is similar in that aspect to the simulation method[338].

In the first method of cost-based approach the prices of the plaintiff are used as its input costs and the variables such as the supply and demand as factors that contribute to shape the final price. The margin it returns will be used to determine the pass-on rate.[339] The rate is then used by the courts to calculate the discount issuable to the invoker of the passing-on defence.

The second method creates a full competitive market and makes predictions on the anti-competitive behaviour as well as on the degree of discount for passing-on.[340] During the creation of the market, the price elasticity and information on competitors are of great structural importance[341]. If the behaviour of the competitors can be included, the method is likely to be more effective as it is a complete economic mode[342]

Nevertheless, in both methods, due attention must be given to the market specific conditions. In the Christie's and Sotheby's price fixing case[343], where both auctioneers were followed for fixing the buyer's premiums and seller's commission rates have agreed to settle for 256 mln. US dollars each. In the case the court has neglected the specific conditions of auction preferred by both parties and wrongly estimated the compensation payable to the buyers, which should have been lower than the sellers as their higher premiums were already factored in the price they paid. Market specific conditions must therefore be addressed by an expert in that market.

3.7. Mitigating factors

As a general principle, in but-for scenarios the victim should not receive more than the calculated harm as overcompensation is not allowed in the EU. This principle is rather easy to

[338] T.van Dijk, F.Verboven, (n 306) p.17.
[339] *Ibid* , p.18.
[340] *Ibidem.*
[341] *Ibidem.*
[342] *Ibidem*
[343] *Ibid,* p.21.

implement by comparing but-for the damages action. However, if the victim has also benefitted from this event in different ways, this amount may be subtracted reasonably from the compensation. For example, in non-competition case, if a car accident causes a victim to get badly injured but at the same time victim makes millions from publishing his/her story and struggle, the additional profits may be deducted from her compensation. This is called "off-setting benefits".[344] Similar implementations may also be applied in actions for damages, however, due to the intricate and sensitive nature of the situations the application may differ significantly per case. Similarly, when some of the wrongdoing may be attributable to the victim, the compensated amount can be proportionally reduced. This principle is known as "Own fault of the injured person". [345]

4. Practical Insights

4.1.The Netherlands

Alstom c.s v. TenneT c.s

In the follow-on Cartel case, *Alstom c.s v. TenneT*[346] *c.s,* Court of Appeal of Arnhem Leeuwaarden in the Netherlands heard the appeal in the earlier Gas Insulated Switchgear (GIS) case in which Alstom c.s. was found liable for damages in the amount of 14.1 million Eur for operating in a GIS cartel. Following the decision from the EC in 2008[347] Tennet successfully claimed the overcharge they had paid throughout the years. During the appeal hearing, Alstom unsuccessfully raised issues such as the *lex loci delicti*, limitation periods and claimed that the district court who ruled at the first stage wrongfully included the project in cartel coverage that is topic to this case.

Full Compensation

During the district court hearings TenneT has claimed and was awarded all 14.1 million Euros i.e. received full compensation as claimed. In substantiating their claim, the court held that the burden of proof for such claim laid with TenneT. Tennet in return provided a quotation and a

[344] Ariel Porat, Eric A. Posner, Offsetting Benefits Virginia Law Review, Vol. 100: 1165. 2014, P.1166.
[345] See Groenendijk & Kloppenburg (n 336).
[346] ECLI:NL:GHARL:2018:7753 *Alstom c.s v. TenneT Appeal case (Translations were made by the author of this study)*
[347] Case COMP/F/38.899 – Gas Insulated Switchgear

contract showing a large price difference for the same product from another member of the cartel ABB Ltd, who received immunity from the EC due to the leniency procedure they initiated. The quotation date was during the cartel in 1999 and the contract was after the end of the cartel in 2005. The court held that the burden of proof laid with Alstom to prove that the quotation and contract concerned a different product, and applied the principle of effectiveness, by giving Alstom the possibility to rebut the nature of the product. However, the court found that Alstom's rebuttal was not sufficient. In a second attempt, Alstom argued that the drop in the prices was connected to the drop-in production costs, while not providing calculations to substantiate their argument. Conversely, Tennet has managed to prove that the production costs have become higher in the mean period.[348] The court accepted Tennet's calculations that led to the claim.

Methods of Quantification /Passing On

Tennet's economists have calculated the cartel overcharge by applying time comparator approach model based on the alternative but comparable product. The cartel overcharge was estimated to be around %53 to %64[349] by comparing the cost of the product during and after the cartel, including all variable circumstances such as currency rate and production cost raises. The percentage of the overcharge was applied to the original payment, which indicated the total overcharge to be between 13.000.000 to 15.200.000 Euros. The court awarded the average of the range as damages 14.100.000 Eur, plus accrued legal interest. [350] Subsequently, Alstom has invoked the passing-on defence. Based on the Dutch civil code which is in line with damages directive, the court was asked to deduct the passing-on charges.

Tasks Assigned to Private enforcement / Overcompensation

In a striking argument, the court confirmed that Tennet was overcompensated; however, the chances of direct purchasers of Tennet recovering passed-on damages from Alstom were next to nothing given the limitation periods and procedural hinders; but overcompensating Tennet can lead to drop in their prices which in return still benefit the society and victims as such.[351] In an exemplary decision of corrective compensatory justice, the court has taken away from the

[348] ECLI:NL:RBGEL:2014:6118. Rechtbank Gelderland, *Alstom c.s v. TenneT District courts case* Para 2.18.
[349] See footnote 80.
[350] *Alstom c.s v. TenneT* (n 145) Para 4.33.
[351] *Ibid*, Paras, 2.29-2.31.

violator and created a scheme of full compensation for the victims who are not likely to claim their overcharge on their own, and meanwhile fully compensated Tennet.

Van Gelder Groep B.V v. Shell Nederland Verkoopmaatschappij B.V. et.al.

In an ongoing follow-on case from the Bitumen cartel decision of the Commission,[352] Van Gelder Groep a road construction company, claimed that it had suffered overcharge from the members of the Bitumen cartel, namely Kuwait petrol and Shell Nederland[353]. In the first hearing, Shell Nederland contended that the proceedings are actually time-barred, as the cartel had become public news much earlier than the proceedings and the start of the period of limitations should be set to that date.[354] The court in principle agreed with this position but further noted that, in the same news other members of the cartel were not mentioned, and that Van Gelder Groep could not have the required subjective knowledge to protect itself and allowed the furtherance of the claim.

Extent of the damages /remoteness/Presumption of Harm

Shell in a second attempt contended that it could not be held liable for damages as it was not possible to attribute the extent of the damage to each member of the cartel and therefore it was not possible to litigate on this basis.[355] However, the court disagreed and in line with the Damages Directive provisions, used the presumption of harm in cartel cases, and stated that it was sufficient for the members of the cartel to come together and create the likelihood of damage to occur.[356]

Causal link

Next, the court moved to establish the causality. Van Gelder contended that besides the higher prices it had to pay to the cartelized undertakings, that it had also missed out on orders, therefore, also suffered loss of profits due to the higher prices during the cartelized period. The court took the Commission decision into account and stated that Commission has already established the cartel forming and anticompetitive effects it had on the market, and it is up to Shell et al. to

[352]Case COMP / 38.456 – Bitumen – NL.
[353] ECLI:NL:RBROT:2018:8001, *Van Gelder Groep B.V v. Shell Nederland Verkoopmaatschappij B.V. et.al.*
[354] *Ibid*, para 7.8.
[355] *Ibid*, para 7.20.
[356] *Ibid*, para 7.21.

prove that Commission had made technical errors in coming to that conclusion. This issue remains debated at this moment.

Against this background, the court presumed that cartels cause harm and Van Gelder as an operator in the same market is accepted to have suffered from the anti-competitive effect, and therefore, there is a causal link between the damages Van Gelder suffered and the actions of the cartel.[357]Following this establishment, the court allowed Van Gelder to the quantification phase.[358]The session for quantification is still pending, but the court pointed out the applicable quantification methods and so far, the Court had not encountered any conflicting national rules in the application of the damages directive.

Methods of Quantification

In the quantum phase court noted the established principles of full compensation, i.e. the victim to be stated into the position had the infringement not taken place, and the application of the method that best is comparable to the situation at hand, thereby indicating the application of the "comparator" models.[359] At the same time court also noted that overcompensation must be avoided and the possibility involvement of experts in the quantum phase. Earlier in the session, Shell pointed out that Commission in its Bitumen Cartel decision considered that the actual impact of the bitumen cartel on the market is impossible to determine due to the lack of information, and the (net) prices evolved in the market in the absence of arrangements for the same reasons[360]. Nevertheless, the court assumed the possibility of concrete calculation of damages.[361]Furthermore, the court believed that Van Gelder could have only saved or collected pieces of evidence from the day the of the Commission's decision in 2006. Therefore in the beginning phase of the quantification process, if neither party has been able to sufficiently demonstrate the correctness of their arguments, the court will apply the comparator model in abstract market conditions and involved parties will be required to support and substantiate their arguments with pieces of evidence based on the court's assumed conditions.[362]

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[357] *Ibid*, paras 7.22-24.
[358] *Ibid*, para 7.40.
[359] *Ibid*, para 7.41.
[360] Case COMP / 38.456 – Bitumen – NL, para 314.
[361] *Van Gelder* , 7.41.
[362] *Ibid*, para 7.43-45. Thereby indicating combination of Simulation and comparator model.

Stichting Cartel Compensation v Koninklijke Luchtvaart Maatschappij N.V. et.al

Presumption of Harm / Overcompensation

In the follow on litigation from the Air Cartel Case of the Commission where the cartelists were fined a total amount of € 776 465 000 for participating in a price fixing cartel that covered flights from and to the EU setting the prices of fuel and security surcharges[363]; the so-called shippers who have been in business with the airliners made a total claim of 216.942,546 Euros to be paid from the airliners at the Amsterdam District Court.[364] The shippers have given mandate to *Stichting Cartel Compensation* to lay claim for their suffered losses in from of excess charges during the cartel period of 2000-2006[365].The excess charge was mostly made on top of the "base rate" the airliners used.[366] The claimed amount mostly was overcharged by the Dutch flag carrier KLM and the Stichting Cartel Compensation requested from the court to move on to calculate the damage and compensate the victims of the infringement.[367] However, court found that the case is of such a complex nature that every transaction is impossible to disconnect from other members of the cartel. If this motion was granted, it would have caused inconsistencies and possible multiple damages payment from the infringing parties. To prevent this situation, case was decided to be merged with different pending cases.[368]

Causal Link/ Extent of the Damage

Furthermore, the court decided not to grant the SCC's wish for immediate move towards the quantification phase and instead noted that, the airliners must be given the possibility to rebut the claim laid by SCC, and in such possibility, SCC is required to prove before the court compounds of its claim namely, the causality and the extent of the suffered damage.[369] During that procedure SCC must sufficiently established why these damages were caused by the airliners.

Methods of Quantification

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[363] 2017/C 188/11— Airfreight
[364] ECLI:NL:RBAMS:2015:1780 *Stichting Cartel Compensation v Koninklijke Luchtvaart Maatschappij N.V. et.al*
[365] *Ibid,* para 3.1.
[366] *Ibid,* para 3.2.
[367] *Ibid,* para 3.1.
[368] *Ibid,* para 4.8.
[369] *Ibid,* para 4.11.

From this moment the court recalled the practical guide and referred to but-for method for quantification. [370]An interesting aspect is that it was the first time, that the court used the possibility of quantification in abstract, thereby utilizing a combination of simulation and but-for method.

According to this calculation, the suffered damage will be assessed by comparison of the actual price charged during the cartelized timeframe to the price which they would have paid in the hypothetical world where no wrongdoing is assumed by the carriers. [371]

Cdc Project 13 Sa V Kemira Chemicals Oy

In a follow-on action based on the Commission decision on Sodium Chlorate Cartel, where the commission fined the producers of Sodium Chlorate for influencing the input in the market and on price fixing charges, a claim vehicle CDC, was mandated to lodge a claim amounting to 61 Million Euros for a total of twelve different purchasers.[372]

Principle of effectiveness

The Amsterdam District Court after accepting jurisdiction was tasked with the question, whether the claims lodged by CDC were subject to time limitations.[373] Based on the Dutch Law the assessment had to be made under the law of the countries where the producers had their place of businesses. The court thoroughly reviewed each countries' law and concluded that under the Slovakian, Czech and Spanish law the case was already time barred and could no longer be litigated. CDC objected to this decision and raised the principle of effectiveness, [374]which under the Finnish and Swedish law it contended the claims should still be litigated. Furthermore, CDC contended that the claimants had only become aware of the wrongdoers after the Commission released its summary decision. The court pointed at the Commission press release dated in June 2008 and thereby concluded that the claimants should have acted earlier, and the time limitations were still applicable and that the principle of effectiveness could not be invoked.[375]

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[370] *Ibidem.*
[371] *Ibidem.*
[372] Case COMP/38.695 – Sodium Chlorate
[373] ECLI:NL:RBAMS:2017:3166 *Cdc Project 13 Sa v Kemira Chemicals Oy,*
[374] *Ibid*, paras: 4.24, 428-4.33.
[375] Press release available at : https://ec.europa.eu/commission/presscorner/detail/en/IP_08_917 01.05.2020.

The case was appealed on the same grounds, to invoke the principle of effectiveness, in the Amsterdam Appeals Court.[376] The court has overturned the district court's decision and sent it back for review. The main line of argumentation Appeals court used was related to the short limitation periods that were applicable at the corresponding national levels. The Appeals court contended that limitations are contrary to the EU principle of effectiveness and stated that an injured party should be granted sufficient time to lodge a claim, which would mean that the victim should be able to wait for the Commission's decision, and could even appeal that decision as a basis to lodge its claim.[377]

East West Debt B.V., v, United Technologies Corporation, et.al

Principle of effectiveness

In a follow-on case based on the Commission's decision on the "Elevator Cartel", [378] where multiple elevator producers were found guilty of forming a cartel, EWD a claim vehicle, lodged a claim against the subsidiaries of the elevator cartel members.[379] The district court of Midde-Nederland held that while an infringement taken place at the EU level, it does not automatically trigger liability of the infringing party's subsidiaries.[380]

Causal link/ Damages

The same case was appealed to the court of Arnhem-Leeuwaarden and the appeals court confirmed the earlier judgment.[381] In its reasoning, the necessary steps for a successful tort claim was reiterated. According to Dutch law, the necessary requirements for a successful claim are an unlawful act, relativity, damages and a causal link between the unlawful act and the damages. The court stated that each of these elements should be presented and where necessary rebutted by the infringing party in accordance with the EU principles of effectiveness and equality.[382]

Extend of Harm

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[376] ECLI:NL:GHAMS:2020:194 *Cdc Project 13 Sa v Kemira Chemicals Oy*
[377] *Ibid*, para 3.5.4.
[378] COMP/E-1/38.823 - PO/*Elevators and Escalators*
[379] ECLI:NL:RBMNE:2016:4284 *East West Debt B.V., v, United Technologies Corporation, et.al*
[380] *Ibid*, para 4.10.
[381] ECLI:NL:GHARL:2019:1060 *East West Debt B.V., v, United Technologies Corporation, et.al*, para 6.1.
[382] *Ibid*, para 5.12.

In its further elaboration court stated that a subsidiary which can be attributed to a part of the damages that its mother company has inflicted, does not necessarily entail an order to payment of the amount which the claim is made. Similarly, court agrees to presume that a harm was inflicted from the forming of a cartel but the obligation for a claimant to prove the extent of the damage remains and the causal link stays. In its examination, court noted that EWD has failed to substantiate its claim as to which party has bought in which amount a certain type of product from which producer. [383]

Umbrella Customers

Noteworthy was that court also stated that EWD cannot lodge a claim for the "Umbrella" customers as other producers who were negatively impacted from the cartel, were not among the defendants.[384]

4.2.Belgium

Herman Verboven et.al. v. Honda Motor Europe Logistics

Principle of Effectiveness

In the longstanding "Honda"[385] follow-on case, a group of parallel importers of motors laid a claim against Honda in 2006 for damages. In 1999 Honda was fined 750.000[386] Eur for the abuse of its dominant position in issuing conformity certificates in the Belgian market. The decision became final in 2011 after being upheld by the highest appellate court, and in 2017 The Commercial Court of Ghent ruled in favour of compensation for damages. In the initial phases of the court hearings, the court was tasked with referring a preliminary question the Belgian Constitutional Court whether a damages claim can be subject to time limitation periods. The Constitutional Court ruled that competition damages cannot be time-limited and referred to a provision in the Damages Directive that states a national rule on limitation periods should not unduly hamper the bringing of actions for damages.[387]

Methods of Quantification /Tasks assigned to Private enforcement

The commercial Court of Ghent moved on to calculate the damages but decided that it is excessively difficult to do so as the facts of the case date back to 20+ years. Consequently, the

[383] *Ibid*, para 5.18..
[384] *Ibid*, para 5.21.
[385] *Herman Verboven et.al. / Honda Motor Europe Logistics. KH Ghent (*A/12/02970).
[386] Belgisch Staatblad (13.03.1999) p.8239. Original fine issued to Honda was 30 Million Belgian Francs.
[387] Damages Directive (2014) Recital 36.

Court has agreed with Honda that each of the claimants may not be able to bring conclusive evidence; however, not granting any damages would be against the objectives of Competition law enforcement. The court decided to use its discretionary power its entitled under Belgian law based on the good faith assessment of "*ex aequo et bono*" and issued 20.000 Euros plus interest to each claimant.[388]

4.3.UK

Deutsche Bahn AG and others v Morgan Advanced Materials Plc

In a UK follow-on case to electrical and mechanical carbon and graphite products cartel,[389] which included Morgan Advanced Materials Plc and which blew the whistle on the cartel to receive immunity from any fines, Deutsche Bahn AG filed claim against the cartel due to the losses it allegedly suffered in CAT.[390] The statute of limitations regarding the original case came to an end on the 18th December 2008 while the follow on case was instigated on 15 December 2010. According to the English law, a follow-on case may not be lodged until the appeal period of the original case, that is, the Commission's decision. It is stated in the UK law that the time frame to lodge the claim is two years from the Commission's decision. CAT was thus permitted to proceed with the claim.

Statue of limitations / Principle of Effectiveness

The case was first referred to appeals court and from there to the Supreme Court after both first and second instances allowed to proceed to the claim. The question directed to the Supreme Court was whether the follow-on case was brought on time[391]. According to the Supreme court it depended on two possible viewpoints: a) whether the Commission's decision was viewed as a decision against the Morgan Advanced Materials, and b) as a decision made against all the cartelists which was appealed by most of them. In the former scenario the statute of limitations began on the 13th of February 2004, while the latter scenario considered the follow-on case on time. The supreme court considered that an earlier EU case has concluded this issue and any non-challenged decision becomes final to the addressee. Therefore, the claim was considered to have been lodged out of the two years period and therefore not admissible.

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[388] Robbert Snelders et.al. The Dominance and Monopolies Review - Edition 7 p.66
[389] Case C.38.359 ñ *Electrical and mechanical carbon and graphite products.*
[390] CAT, 1173/5/7/10, *Deutsche Bahn Ag V Morgan Crucible Company Plc Et.Al*.
[391][2012] EWCA Civ 1055, *Deutsche Bahn Ag & Ors V Morgan Crucible Company Plc & Ors*, para 120. and *Ibid*, para68,(2)

This is a very interesting case and intriguing case for two reasons. Firstly it fully contradicts the earlier studied Dutch case *Cdc Project 13 Sa V Kemira Chemicals Oy*, where the Appeals court contended that limitations are contrary to the EU principle of effectiveness that any injured part was to have sufficient amount of time in order to lodge a claim and only this would ensure compliance with the EU principle of effectiveness, and secondly, it demonstrates the level of different interpretation between two different member states at the level of Appeal courts.

5. Remarks based on the practical insights

5.1.Full compensation

The principle of full compensation remains an open issue in the court. The expectancy created in the court compared to the amount compensated may however be deceiving. There are many factors involved in obtaining full compensation, and what is "full" seems to be the extent of what can be proven in court or settled outside of the court. Similarly, some defendants by rebuttal influence the amount of full compensation .It can also be seen from the cases overviewed that an initial claim of what is considered to be full can be attained in a middle way and considered to be compensated in full.[392] Furthermore, where a damage cannot be attributed to an infringer, or where a causal link cannot be established to a damage that is otherwise existent, deadweight losses may occur. The extent of the full compensation is not clear, and it can be met by means other than economical. Furthermore, indirect purchasers standing while facilitating the corrective task serve also to complicate the determination of sufficient extent for full compensation by multiplying the procedure by each level of a claiming purchaser.

In cases where the courts are making a great effort to clearly define the necessary elements such as in *East West Debt B.V., v, United Technologies Corporation, et.al* where the court demanded from the claimant to clarify which party has bought in which amount a certain type of product from which producer, the damage can be substantiated as a mere economic claim and the extent of sufficient damages maybe possible to assess.

[392] See *TenneT* case (n 348).

5.2.Principle of Effectiveness

The principle of effectiveness has been used in the larger meaning of "Concept of effectiveness" as described above. The wide interpretation creates multiple opportunities at national level to find grounds for claiming or defending damages. A variety of issues such as limitation periods can be extended or limited[393], or a subsidiary may find an opportunity rebut a claim originating from the parent company.

It is noteworthy that Norbert Reich's assertions on hermeneutical approach on effectiveness holds mostly true at the national level in the in the negative meaning , where a court prohibits a party from claiming damages, it seeks to protect the defendant on effectiveness grounds.[394] However, there seems to be a chaos situation from the larger interpretation of "effectiveness" where courts are making contrary decisions, and the application of multiple tasks assigned private enforcement often creates confusion for involved parties.

5.3.Tasks assigned to EU Competition Law

It is apparent from the case law that the corrective task and deterrence task are realised by the courts interchangeably, exclusively, or combined. The fairness principle that seems to be the driving force behind all the assigned tasks, necessitates such application but also creates uncertainties such as the application of the principle of effectiveness and the right to full compensation in the same context.

5.4.Methods of Quantification

Quantification methods are intricate, long and maybe utilized remotely. The guidance provided to the courts from the Commission maps out all essential and empirical methods thoroughly. It seems that courts at the national level are warming up to take more responsibility and to develop expertise on these matters. The application of combined methods as was seen in cartel cases where but-for modal was accompanied with a simulation, or a simulation method where an

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[393] Deutsche Bahn (n 390).

[394] Such as the Supreme Court of UK preventing the proceedings against Morgan Advandeced Materials Plc, whom made us of the EU remedie of leniency.Also in Tennet case the court is ready to listen a rebuttal from the defendant.

abstract world is created for simulation were noted. Furthermore, most of the countries have legislated to accept experts to quantification phase of damages actions.

Lessons from the U.S.

The century old private enforcement system in the federal U.S. is a relevant topic beyond doubt. It is even more relevant when the federal like characteristics of EU comes to mind. It was not so long ago that private enforcement in U.S. was also in a state of chaos. The multiple level of state and federal laws pertaining the matter and diverse approaches the instances preferred, combined with underperforming cooperation regime created a not so well functioning private enforcement machine.[395] However, the century long experience built in the system managed to convert it to a polished machine only by procedural tweaks. These tweaks were embodied in the indirect purchasers standing and the passing-on regime.

The real dimension beyond the tweaks were different. The "bottom-up" approach of the federal U.S. which respects the policy choices at both levels, have come to a total system failure in the issue of indirect purchaser standing.[396] It was not before that a choice was made to ban indirect purchaser standing and to apply corrective justice in these cases, the system became "effective". The conventional wisdom in U.S. chose for deterrence, instead of a balance between fairness, and effectiveness. [397]In other words, U.S. system opts for a single substantive standard with a strongly coordinated mechanism.[398] The choice, naturally is not custom made for the EU, but a successful and coherent private enforcement system such as that of the U.S. is readily available and with a policy change from multiple tasks and standards to private enforcement and a bottom-up approach may deliver real results. A coherent Private enforcement system can contribute much better to Public enforcement system and deterrence.

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[395] Cengiz (n154) , p.5

[396] *Ibid*. p. 24.

[397] *Ibid* p.5

[398] *Ibid*, p.6

Consensual Dispute Resolution

In attempt to avoid legal uncertainty, consensual dispute resolution in the Damages Directive is relevant for this study. The procedural and remedial aspects of actions for damages is a task for the member states, but also alternative dispute resolution methods, such as arbitration and mediation. National courts are expected to ensure that each damages action is offered a consensual dispute resolution possibility for all involved.[399] In order to further facilitate this, the Directive provides for the chance to suspend the limitation periods for the timeframe needed for ADR mechanisms[400] and also for the settling co-infringers, to reduce their share of the harm inflicted, and the chance to no longer be liable for the remaining un-settled harm.[401]

Concluding remarks

Procedural law is a requirement to implement substantive law effectively. An effective enforcement system is a requirement for an effective competition policy. Coherent private enforcement, compliments public enforcement which in turn benefits the society. The balance between the latter two is sought by policy choices to determine the level of effectiveness in the system. These choices and their outcomes are first presented than analysed at the more practical level above.

The policy choices in the form of tasks assigned to private enforcement is a very eager one that includes deterrence and corrective tasks used to achieve the objectives of both at the same time, while the efficiencies may lie in the use of a sole task for a sole objective. To prevent clashes between the tasks, compromises, i.e. preferences are necessary to make.

The insights from the U.S. in this regard are valuable, *mutatis mutandis*, and give a robust example of the predictability such clear choices can bring to an antitrust enforcement system. More practically, the prohibition on the indirect purchaser standing and therefore the passing-on defence, eliminates multiple levels of complexity, such as the extent of the harm and causality in remote claims, while the welfare of the society is protected in the larger context.

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[399] Damages Directive (2014) , Recital 5.
[400] *Ibid*, Art.18.
[401] *Ibid*, Art 19 (1),(2).

For the victims of competition infringements, effectiveness principle, or the concept of effectiveness as studied above gives birth to the challenging procedural requirements such as the "right" to full compensation, which is a near impossible goal to meet. Regarding the determination of the extent of harm, more practical or procedural efficiencies can be found from secondary cases at the national level. Similarly, effective establishment of causality is an intricate task. In remote cartel cases when the existence of causal link is accepted due to passing-on, settling for distribution of the infringers gains among victims is a procedural relief and also relevant to the system as a deterrent factor for cartelists. Methods for calculation on the other hand seems to have found a solid ground in the hands of the judges and NCAs. The developments in the field of arbitration before private enforcement is encouraging and should be preferred over quantification before the court as the parties can agree to quantification terms as well.

Further clarifications can also be obtained by the courts. It is partially observed that courts are moving to decide on cases without clear instructions. It may produce efficiencies in the bigger picture to ask for more clarifications Perhaps, a collection and publication of case law from the member states may help avoid courts inventing the wheel again and again and prevent contrasting interpretations.[402]

The U.S. experience illustrates that the emergence of a coherent and effective private enforcement regime depends on compromises in competition policy. The concept of effectiveness should also not be used unconditionally to contain national systems to comply with EU law. A balanced system of compromises where concept of effectiveness and national remedies reason to one another, is likely to produce more coherence and relief for victims as such. It should be bore in mind that effective application of EU law also means improving the quality of judicial decision-making mechanisms and a clarity in quantification of damages. The upcoming review of the Damages directive before the 27th of December 2020 is a good moment for improvement or a shift towards claimant friendly litigation culture.

[402] Van den Bergh (n 59), p.17.